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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

NO. 130

JOE C. STEPHENS, ET AL,
Petitioners,

vs.

ST. LOUIS UNION TRUST COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

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Commercial Recorder—Fort Worth, Texas—2-5396

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PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The petition of Joe C. Stephens, and twenty-five others similarly situated, respectfully shows:

A STATEMENT OF THE MATTER INVOLVED.

This Petition for Certiorari involves an important Federal jurisdictional question, which it is submitted the Circuit Court of Appeals for the Fifth Circuit has decided contrary to long-established decisions of this court. The Circuit Court of Appeals, in revers-

ing the District Court's judgment, sustaining Motions to Dismiss Respondent's Bill of Complaint for want of jurisdiction, held that, in determining whether the amount in controversy exceeds $3,000.00 exclusive of interest and costs, as required under Section 41, Title 28, U. S. Code Annotated, the controlling factor in this particular case was *not* the amount sought to be recovered against each of the twenty-six defendants, but was the "amount due under the default" or "the amount of default by the principal debtor," or "the amount involved in the principal demand" (all three expressions being used by the Circuit Court in its opinion. (R. 35-36).

It is the contention of Petitioners that the unprecedented rule announced by the Circuit Court of Appeals, for determining "the amount in controversy" in a diversity of citizenship case brought in the United States District Court, is contrary to the decisions of this Court in the cases of:

Ex Parte Phoenix Insurance Company, 117 U. S. 367;
Wheeler v. Cloyd, 134 U. S. 537;
Wheless v. St. Louis, 180 U. S. 379, 382.

The following are the salient facts involved in this action:

Respondent, St. Louis Union Trust Company, sued twenty-six defendants (Petitioners herein) in the United States District Court at Dallas, Texas, for $39,000.00 principal, and $7,350.00 interest upon an alleged joint and several guaranty, basing Federal Jurisdiction upon diverse citizenship. (R. 5).

The alleged liability grew out of a written guaranty (R. 5-10) given by Petitioners (26 of them) in favor of Respondent, St. Louis Union Trust Company, in connection with a loan made by First National Company, St. Louis, to Young Men's Christian Association of Fort Worth, Texas, in the sum of $100,000.00, evidenced by its eleven notes for $4,000.00 each and one f or $56,000.00, due at six months' intervals, and 14 interest notes, totaling $34,080.00 (R. 6), secured by a first mortgage deed of trust lien upon the Y. M. C. A. Building, and the 100 x 150 foot site upon which it stands, in the City of Fort Worth, Texas (Exh. "A"-R. 5). Inasmuch as the sole question presented in this Petition for Certiorari, concerns the jurisdiction of the District Court to entertain this suit, brought by St. Louis Union Trust Company on said "Guaranty," Petitioners feel justified in quoting the following provisions from the Guaranty Agreement, which it is thought are controlling upon the jurisdictional question presented:

> "Now, Therefore, in consideration of the premises and in order to induce said First National Company to make or procure said loan for itself or for the account of its clients or future holders thereof and for other good and valuable considerations, said undersigned guarantors, for themselves, their heirs, executors and administrators, do hereby, jointly and severally, guarantee unconditonally unto the St. Louis Union Trust Company, a Missouri corporation of St. Louis, Missouri, as trustee of an express trust, for the use and benefit of the holder or holders from time to time of the respective notes hereinbefore described,

its successors and assigns, the payment of all and singular the sums due and to become due on each and all of the said notes above described, both principal and interest, according to their respective tenor, purport and effect: Provided, however, that no signer of this guaranty shall be liable for a greater amount of principal or of interest than the amounts respectively, set opposite his signature, together with eight per cent (8%) interest per annum on so much thereof as he shall not pay when due." * * * (R. p. 8).

"In Witness Whereof, said undersigned have hereunto and to a duplicate copy hereof set their hands, and have subscribed against their respective signatures the several amounts of their respective guaranties for principal and interest aforesaid.

Signed in the presence of	Name of Guarantors	Respective Amounts of Interest Guaranteed	Respective Amounts of Principal Guaranteed
R. E. Squires	R. O. Dulaney	$1000.00	$1500.00
R. E. Squires	W. T. Ladd	1000.00	1500.00
R. E. Squires	C. P. Schenk	1000.00	1500.00
R. E. Squires	Wm. J. Baker	1000.00	1500.00
R. E. Squires	Littleton Harwell	1000.00	1500.00
R. E. Squires	Earl M. North	1000.00	1500.00
R. E. Squires	J. B. Baker	1000.00	1500.00
R. E. Squires	Joe C. Stephens	1000.00	1500.00
R. E. Squires	G. J. Stone	1000.00	1500.00
R. E. Squires	Harry B. Friedman	1000.00	1500.00
R. E. Squires	Amon G. Carter	1000.00	1500.00
R. E. Squires	John P. King	1000.00	1500.00
R. E. Squires	L. C. Abbott	1000.00	1500.00
R. E. Squires	John P. King, Jr.	1000.00	1500.00
R. E. Squires	Edwin E. Bewley	1000.00	1500.00
R. E. Squires	Willard Burton	1000.00	1500.00
R. E. Squires	Ben E. Keith	1000.00	1500.00
R. E. Squires	Edward A. Landreth	1000.00	1500.00
R. E. Squires	Chas. F. Roeser	1000.00	1500.00
R. E. Squires	E. O. Gillam	1000.00	1500.00
R. E. Squires	R. Ellison Harding	1000.00	1500.00
R. E. Squires	Wyatt C. Hedrick	1000.00	1500.00
R. E. Squires	Wiley G. Clarkson	1000.00	1500.00
R. E. Squires	Julien C. Hyer	1000.00	1500.00
R. E. Squires	Van Zandt Jarvis	1000.00	1500.00
R. E. Squires	Jesse James Walden	1000.00	1500.00"

(R. 10).

Respondent's suit was against all twenty-six guarantors, to recover a joint and several judgment, *not* for the $73,500.00 principal, and $7,350.00 interest due to June 1, 1935 (R. 4), *but* for $39,000.00 principal, plus $7,350.00 interest (R. 5); the $39,000.00 principal amount sued for obviously being 26 x $1,500.00, the respective principal amount guaranteed by each subscriber to the guaranty agreement (R. 5). The Young Men's Christian Association, principal obligor, was not made a party to the suit, nor was foreclosure sought of the first mortgage deed of trust lien upon the Y. M. C. A. Building and ground upon which it stands, securing the indebtedness sued upon.

Petitioners (defendants in the District Court) presented motions to dismiss Respondent's suit, on the ground that the amount actually in controversy, as to each of the Petitioners, was less than Three Thousand Dollars ($3,000.00), exclusive of interest and costs. (R. 11).

The District Court first overruled these motions to dismiss (R. 12-13), but later sustained them, dismissing Respondent's suit (R. 14-18) on the ground that the twenty-six (26) respective amounts of principal ($1,500.00), guaranteed by each signer of the guaranty, could not be "tied together" to confer jurisdiction upon the District Court to entertain the suit, inasmuch as one suit could be brought in a State Court of Texas by Respondent against all twenty-six defendants, thus avoiding a multiplicity of suits; and further, that Respondent's Petition filed in the District Court, did not charge a combination and conspiracy, or fraud; nor did same deal with a creditor's bill,

all of which constitute well recognized exceptions to the condemned "tying together of separate causes of action" rule, in order to confer jurisdiction. (R. 17-18).

Respondent appealed from the judgment of the District Court sustaining Petitioners' Motions to Dismiss for want of Jurisdiction, and upon hearing before the United States Circuit Court of Appeals at New Orleans, on January 4, 1941, the judgment of the District Court was reversed, the holding of the Circuit Court of Appeals being summarized in the concluding paragraph of its opinion, which reads:

> "There was a single contract of guaranty which all of the defendants signed and became parties to, in which they all promised the same thing to the guarantee, and as to him, that obligation was indivisible, except as to the limitation upon his right to require payment by any one of them of not more than $2500. The subject matter of the suit was this contract. The whole amount due thereunder as well as the extent of liability of each defendant, had to be determined by the lower court, and, having jurisdiction in view of the *amount involved in the principal demand*, it could and should decide all the other issues. The judgment is reversed and the cause remanded for further proceedings according to law." (R. 33-36).

Petitioners' Motion for Rehearing was overruled on March 8, 1941, (R. 49) and upon application of Petitioners, the court's mandate was stayed until April 7, 1941, and later extended to June 8, 1941. (R. 50-51).

JURISDICTION OF THIS COURT TO REVIEW.

This proceeding involves the correctness of the District Court's action in sustaining Petitioners' motions to dismiss Respondent's suit, because of absence of the required jurisdictional amount — the suit being one between citizens of different States (see Judgment of Dismissal, R. 19-20). The right of direct appeal to the Supreme Court of the United States, under Section 345, Title 28, United States Code, Annotated, having been removed under the Act of February 13, 1925 (See *Luckett v. Delpark*, 270 U. S. 496), Respondent appealed to the United States Circuit Court of Appeals, Fifth Circuit, which on January 4, 1941, reversed the District Court's order of dismissal, and on March 8, 1941 overruled Petitioners' Motion for Rehearing (R. 37).

A review of the Circuit Court of Appeals' judgment is sought by this Petition for Certiorari, under sub (a) of Section 347 Title 28, U. S. Code Annotated, which provides:

> "In any case, civil or criminal, in a Circuit Court of Appeals, * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, * * * to require by certiorari, either before or after a judgment or decree by such lower court, that the case be certified to the Supreme Court for determination by it, with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The judgment of the Circuit Court of Appeals was entered January 4, 1941, and Petitioners' Motion for

Rehearing was overruled March 8, 1941, which constitutes the final judgment here appealed from. (R. 49). The three months' period, provided for in Section 350 of the Judicial Code, for the filing of this Petition for Certiorari, in the Supreme Court, therefore will not expire until June 8, 1941, prior to which date this Petition will be filed with the Clerk of this Court.

QUESTION PRESENTED.

The sole question presented in this Petition for Certiorari is:

This suit, being one between citizens of different states, and the acknowledged liability of each defendant beng expressly limited, under the Guaranty Agreement sued upon, to the payment of $1,500.00 of principal and $1,000.00 interest, did the District Court correctly hold that the twenty-six respective $1,500.00 principal amounts, for which each defendant was liable, could not be added or "tied together," in order to make the aggregate principal liability of all twenty-six defendants $39,000.00 (26 x $1,500.00), an amount within the Court's jurisdiction; the reasoning of the District Court being that the uniting of the respective liabilities of the several defendants, to bring the suit within the required jurisdictional amount, is permissible only to avoid a multiplicity of suits in the State Court, or where there is a charge of a combination, conspiracy or fraud, or in the case of a creditor's bill; none of which exceptions to the general rule, the District Court found was present in this case? or,

Was the Circuit Court of Appeals correct in holding that the jursdiction of the District Court to entertain Respondent's suit should be determined, *not* by the limitation of $1,500.00 in principal amount, which each defendant guaranteed, and for which each defendant was liable, and for no more, *but* by the "amount due under the default," or "the amount of default by the principal debtor," or "the amount involved in the principal demand?" (All three expressions being used in the opinion of the Circuit Court of Appeals).

Petitioners assert that the District Court's ruling on the jurisdictional question presented, was correct, for, in the absence of a fund, in excess of $3,000.00, in the court's possession for adjudication, or a charge of conspiracy, or a plea that this suit is brought in the District Court of the United States to avoid a multiplicity of suits which otherwise would result, if suit was required to be brought in the State Court, (none of which exists in this case), the respective causes of action against the several defendants (no one of which is itself within the jurisdiction of the District Court of the United States) cannot be tied together or aggregated in order to confer jurisdiction upon District court; and the Circuit Court of Appeals erred in sustaining jurisdiction on the ground that the amount in controversy was "the amount due under default," or "the amount of default by the principal debtor," or "the amount involved in the principal demand."

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(Same as those set out in Motion for Rehearing).

Reason 1. The Circuit Court of Appeals erred in holding that the District Court had jurisdiction of this suit, on the theory, as stated in the Court's opinion, that it was necessary for the District Court to adjudicate (as a condition to recovery by plaintiffs against the several defendants of a maximum of $2,-500.00 each), "the amount due under the default," or "the amount of default by the principal debtor," or "the amount involved in the principal demand" (all three terms being used in the court's opinion); hence jurisdiction was determined by these amounts, rather than the $1,500.00 of principal for which each defendant was liable, and no more. Petitioners assert that this is not the correct jurisdictional test of "the amount in controversy."

Reason 2. The conclusion reached by the Circuit Court of Appeals, as stated in its opinion, that jurisdiction of the District Court is to be determined by "amount due under the default," or "the amount of default by the principal debtor" or "the amount involved in the principal demand" (all three expressions being used in the court's opinion), is equivalent to, asserting that the jurisdiction of the District Court will be determined by aggregating or tying together the several liabilities of each of the defendants, which in each case is limited to $1,500.00 principal and $1,-000.00 interest. In the absence of a fund, in excess of $3,000.00, in the court's possession for adjudica-

tion, or a charge of conspiracy, or a plea that this suit is brought in the District Court of the United States to avoid a multiplicity of suits which otherwise would result, if suit was required to be brought in the State Court, (none of which exist in this case) the respective causes of action against the several defendants (no one of which is itself within the jurisdiction of the District Court of the United States) cannot be tied together or aggregated in order to confer jurisdiction upon said court; and the Circuit Court erred in sustaining jurisdiction on the ground that the amount in controversy was "the amount due under the default," or "the amount of default by the principal debtor," or "the amount involved in the principal demand."

Reason 3. The Circuit Court of Appeals erred in holding that the District Court of the United States had jurisdiction to entertain this suit, because the amount in controversy was "the amount due under the default" or "the amount of default by the principal debtor" or "the amount involved in the principal demand" (all three expressions being used in the Court's opinion) for the reason that plaintiff did not sue to recover from the defendants either the "amount due under the default" or "the amount of default by the principal debtor" or "the amount involved in the principal demand," but, on the contrary, as stated by Judge Atwell of the District Court—

> "The plaintiff alleges that at the time of the institution of the suit, $73,500.00 was due on the principal, and $7,350.00 on interest. It sues for $39,000.00, which is the aggregate of the $1,500.-00 principal guaranteed by each of the twenty-six

signers, and for the sum of $7,350.00 interest 'which interest plaintiff prays be prorated among the defendants according to the terms of said contract of guaranty'."

It therefore clearly appears that plaintiff's suit is one for the recovery of $1,500.00 principal from each of the twenty-six defendants, or a total of $39,000.00, plus the prorata portion of the twenty-six defendants for $7,350.00 interest. Petitioners assert that jurisdiction of the District Court must be ascertained and determined from the allegations of plaintiff's pleadings, and, as stated, it not appearing that plaintiff sues to recover the "amount due under the default," or "the amount of default by the principal debtor," or "the amount involved in the princpal demand," but on the contrary, $1,500.00 in principal from each of 26 defendants, or a total of $39,000.00 in principal from all, the standards relied upon by the Circuit Court cannot constitute the jurisdictional test of "the amount in controversy."

Reason 4. The Circuit Court of Appeals erred in holding that the District Court of the United States had jurisdiction to entertain this suit, for the reason that the holding of said court is contrary to, and in conflict with the decision of the Supreme Court of the United States in *Ex Parte Phoenix Insurance Company*, 117 U. S. 367; in which case, suit was brought on a single instrument, by which it was adjudged an agent of several insurance companies named, bound them severally, (each for its proportionate share of one-fourth) to insure the property of Mrs. Helen M. Fitton for $12,000.00, and decree was rendered against each

company separately for $3,433.50. The right of appeal was denied by the trial court rendering said judgment, because the recovery against each of the defendants was less than $5,000.00, the jurisdictional amount required to appeal, and the Supreme Court of the United States, in sustaining the trial court's decision, held that the fact that suit was brought on a single insurance policy for $12,000.00, which provided for its apportionment among four companies, could not be availed of as a ground for justifying appellate jurisdiction. If the reasoning adopted by circuit court in the case at bar, had been followed by the Supreme Court, an appeal would have been allowed on the ground that the required $5,000.00 jurisdictional amount for appeal, should be determined not by the amount of the judgment sought to be, and recovered against each defendant, but by the fact, as stated in the opinion of the court, that, in order to recover, it was necessary to "allege, prove, have adjudicated, as a condition precedent to recovery, the amount of default" by all debtors, before there could be an apportionment between them, or, as expressed again by the circuit court, "The subject matter of the suit was this contract. The whole amount due thereunder as well as the extent of liability of each defendant, had to be determined by the lower court, and having jurisdiction, in view of the amount involved in the principal demand, it could and should decide all the other issues". The Supreme Court of the United States, however, held that the $5,000.00 jurisdictional amount, required for an appeal, was determined, not by the standards stated and relied upon in the opinion of the circuit court, but by the amount

of the respective judgments sought to be, and recovered against the several defendants, no one of which alone came within the required $5,000.00 jurisdictional amount.

Reason 5. The Circuit Court of Appeals erred in holding that the District Court of the United States had jurisdiction to entertain this suit, for the reason that the holding of this court is contrary to, and in conflict with the decision of the Supreme Court of the United States in *Wheeler v. Cloyd*, 134 U. S. 537, wherein the Supreme Court of the United States sustained a motion to dismiss the appeal, because the liability of no one of the defendants exceeded $5,000.-00 (the jurisdictional amount required for appeal), and their combined or aggregate liabilities could not be resorted to to sustain the right of appeal; the Supreme Court, in its opinion, stating:

> "It is clear that the appeal must be dismissed. The decree from which it is taken was not a joint decree, as is readily observed by a mere inspection of it. The liability of each one of the defendants under that decree can be neither increased nor diminished by any action on the part of any of his co-defendants. The right of every one of the defendants to appeal from the decree is separate and distinct from that of the other defendants. The amount adjudged against any one of them, in order that he might redeem his respective tract or tracts of land, does not in any case reach the amount necessary to give us jurisdiction to entertain the appeal. In no case is it $5,000.00."

Reason 6. The Circuit Court of Appeals in its opinion, in construing the guaranty contract sued upon,

after stating that "notwithstanding the limitation of maximum liability as to all defendants to $2,500.00 each, by the very terms of the guaranty, they bound themselves, *to that extent,* (italics ours) to pay all of principal and interest of the notes so guaranteed," erroneously concluded that this fact operated to confer jurisdiction upon the District Court to hear and determine this suit, whereas, appellees assert the contrary is true; for assuming the Circuit Court correctly concluded that the defendants did not jointly and severally guarantee the payment of *whole indebtedness* but, at most, only guaranteed the payment, *jointly* and severally, of $1,500.00 in principal and $1,000.00 in interest, the *joint obligation* of defendants is therefore limited to $1,500.00 in principal, which amount is far under the $3,000.00 amount required to confer jurisdiction upon the District Court.

Petitioners assert that the required jurisdictional amount is met *only when* the defendants are *jointly liable* for an amount in excess of $3,000.00 (exclusive of interest and costs) and not $1,500.00, as in this case.

Reason 7. Jurisdiction of a District Court of the United States, based upon diversity of citizenship and the requirement that the amount in controversy must exceed $3,000.00, exclusive of interest and costs, is, and should be strictly construed and applied in order to prevent the Federal Courts from usurping jurisdiction of controversies that rightly should be decided in the State Courts. The holding by the Circuit Court, as announced in its opinion, has no support by any other Federal Court; at least none is cited in the

Court's opinion. Appellees, therefore, assert that the opinion and judgment of this court is contrary to the general principle above stated, and in conflict with the guide post, established by the Supreme Court of the United States, in the case of *Di Giovanni*, 296 U. S. 64, wherein the following solemn warning was given:

> "Congress, by its legislation, has declared its policy that cases involving less than the jurisdictional amount be left exclusively to the State courts. * * * Courts of equity, in the exercise of their discretionary powers, should recognize this policy by scrupulous regard for the rightful independence of the State Governments, and a remedy infringing that independence, which might otherwise be given, should be withheld if sought on slight or inconsequential grounds."

WHEREFORE, Petitioners pray that, in the exercise of its discretion, this Court may issue its Writ of Certiorari to review the decision herein of the Circuit Court of Appeals, and for such other orders as may be appropriate.

Respectfully submitted,

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vs.

ST. LOUIS UNION TRUST COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court sustaining Petitioners' Motions to Dismiss Respondent's suit for want of the required jurisdictional amount ($3,000.-00 exclusive of interest and costs) will be found on pages 14-18 of the Record; the Judgment of Dismissal on page 19-20 of the Record.

The opinion of the Circuit Court of Appeals, Fifth Circuit, reversing the judgment of the District Court, and holding that the District Court did have jurisdiction to entertain this suit, will be found on pages 33-36 of the Record.

The essence of the District Court's opinion denying jurisdiction is found in the following paragraphs thereof:

> "The uniting of the actions, if it is permissible under the rule above mentioned, is a convenience and a saving of expense to all parties, because there can be determined in one suit all of the issues. The obligation, the responsibility, and the defenses, are identical as to each defendant. Of course, the sensible appeal of convenience may not override an express jurisdictional provision, but the avoidance of a multiplicity of suits also has its place in fixing jurisdiction. Such an equity, however, may not be resorted to in a National Court, if the State Court which would have jurisdiction, would not require multiplicity. The twenty-six suits sought to be avoided here, would not be necessary there. One suit can be brought. DiGiovauni v. Camden Insurance Association, 296 U. S. 64; Stockyards National Bank v. Maples, 127 Tex. 633; Campbell v. Land, 69 S. W. 554."

> "So, returning to the first question. Unless there is a union of the individual claims, which are in themselves, insufficient to give jurisdiction, there is no entry into the National Court. Such union must be by combination and conspiracy, or, agreement and conspiracy, or, fraud. DiGiovauni v. Camden Fire Insurance Association, 296 U. S. 64; Pioneer Pyramid Insurance Company v. Hughey, et al, 76 F. (2d) 524; Indemnity Insurance Co. v. School District, 63 F. (2) 878; Georgia Power Company v. Hudson, 49 F. (2) 66; Waltman v. Union Central Life Insurance Co., 25 F. (2) 320; Essman v. Hood, 45

F. (2) 881; Broderick v. American General Corporation, 71 F. (2) 864. The last case deals with the creditors' bill exception to the general rule, and no such contention is made here."

"My first impression was that there is such a tying together by the contract that the jurisdictional amount is present, but a more careful inspection of the contract does not support that view. Thorpe v. Story, 73 Pac. (2) 1194."

"The order overruling the motion to dismiss is set aside, and the cause is dismissed."

The Circuit Court of Appeals, on the other hand, in reversing the judgment of the District Court, and remanding this cause for further proceedings in accordance with law, held that the District Court had jurisdiction of this cause (R. 33-36):

1. Because in order to render judgment against each guarantor for the amount of his contractual liability ($1,500.00 principal, and $1,000.00 interest, or a total of $2,500.00), the trial court was compelled to *adjudicate the total amount of the debt* ($80,500.00 principal and interest) owed by the maker of the note, who was not a party to the suit, and "to that extent and in that sense, the amount in controversy far exceeded its minimum jurisdiction."

2. Because "Notwithstanding the limitation of maximum liability, as to all defendants, to $2,500.00 each, by the very terms of the guaranty, they bound themselves *to that extent jointly and severally* to pay all of the principal and interest of the notes so guaranteed," and plaintiff, to the maximum extent of their

liability, could recover against one or all at its option; but, in so suing, it would again have to allege, prove and have *adjudicated*, as a condition to recovery, *the amount of default by the principal debtor.*"

3. Because "There was a single contract of guaranty, which all of the defendants signed and became parties to, in which they all promised the same thing to the guarantee, and as to him, that obligation was indivisible, except as to the limitation upon his right to require payment by any one of them of not more than $2,500.00. *The subject matter of the suit was this contract; the whole amount due thereunder*, as well as the extent of liability of each defendant, had to be determined by the lower court, and, *having jurisdiction in view of the amount involved in the principal demand*, it could and should decide all the other issues."

Discussion of "Tying Together" Theory

The conclusion reached by the Circuit Court of Appeals, as above set out, that jurisdiction of the District Court is to be determined by "the amount due under the default," or "the amount of default by the principal debtor" or "the amount involved in the principal demand" (all three expressions being used in the court's opinion), is equivalent to asserting that the jurisdiction of the District Court will be determined by aggregating or tying together the several liabilities of each of the defendants, which in each case is limited to $1,500.00 principal and $1,000.00 interest.

Bearing in mind that the Guaranty Agreement sued upon expressly limits the liability of each of the signers to the payment of $1,500.00 of principal, and $1,-

000.00 of interest, and no more (see page 4 hereof); and that it is only by "tying together" the respective liabilities of the several defendants that jurisdiction of the District Court can be sustained, Petitioners feel that it is of prime importance to trace the history of this "tying together" rule, in order to define its application and limitations.

* * * * *

The first case that Petitioners have been able to find, which uses the expression of causes of action being "tied together" so as to give the United States District Court jurisdiction, is *McDaniel v. Traylor*, 196 U. S. 415, decided in 1905, opinion by Mr. Justice Harlan. In that case, after stating the general rule announced in *Walter v. Northeastern Railroad Company*, 147 U. S. 370, that—

> "It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on an appeal in this court, as to those whose claims exceed the jurisdictional amount; and that, when two or more defendants are sued by the same plaintiff in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff,"

the court pointed out that there was an exception to such general rule, same being:

That where the essence of a suit is an alleged *fraudulent combination and conspiracy* on the part of defendants, and by reason of such *combination and conspiracy*, a certain result is achieved, then, as stated

by the court, "The defendants have so tied their respective claims together as to make them, so far as the plaintiffs and the relief sought by them are concerned, one claim;" the reason being that the defendants, by their joint action, in furtherance of the *combination* or *conspiracy*, produced a result, for the correction of which they may be all joined together or united, for the purpose of determining jurisdiction.

* * * * *

The second instance where reference is made to causes of action being "tied together" for the purpose of determining jurisdiction, is on the second appeal to the Supreme Court of the United States of the *McDaniel v. Traylor* Case, 212 U. S. 428, decided in 1909, opinion by Mr. Justice McKenna. It appears from the opinion of the Supreme Court that, following the remanding of the case to the trial court, plaintiffs failed to prove, to the satisfaction of the court, that the charged *fraudulent combination* or *conspiracy* existed, and by reason thereof, the trial court found that it was without jurisdiction. Mr. Justice McKenna, in his opinion on this second appeal, referring to the previous opinion of the Supreme Court on the first appeal of the case, said:

> "As we have already seen, it was the *fraudulent combination* and *conspiracy* which united the claims and made the aggregate of the claims the matter in dispute. By reason of that combination, we decided the claims were 'so tied' together as to make them 'so far as the plaintiffs and the relief sought by them are concerned, one claim' * * *. We further decided * * * if the plaintiffs do not

prove such a *combination* and *conspiracy*, in respect, at least, of so many of the specified claims as in the aggregate will be of the required amount, then their suit must fail for want of jurisdiction, in the Circuit Court; for in the absence of the alleged combination the claim of each defendant must, according to our decisions, be regarded *for purposes of jurisdiction as separate from the others.*" (Italics ours).

Justice McKenna concluded his opinion in the second appeal of the *McDaniel v. Traylor* Case (212 U. S. 428) by approving the finding of the trial court that the evidence failed to establish that the alleged *fraudulent combination* and *conspiracy* on the part of the defendants existed; hence the trial court was without jurisdiction to entertain the suit.

* * * * *

The next instance where reference is made to causes of action being "tied together" for the purpose of determining the jurisdiction of the United States District Court, is found in the case of *Woodmen of the World v. O'Neill*, decided in 1924, 266 U. S. 292. The opinion of the Supreme Court was by Mr. Justice Sanford. It sets out that—

"The bill alleged in substance that the defendants had entered into an agreement and *conspiracy* to embarrass and attempt to ruin the Society; that pursuant to this agreement and conspiracy, they endeavored at a meeting of the Head Camp of Texas to secure their election as delegates to a session of the Sovereign Camp at New York" * * * and that "pursuant to their joint agreement and *conspiracy*, they brought twenty-five separate ac-

> tions at law against the Society in a local court of Texas, to recover amounts ranging from $987 to $1,170; that there was no merit in the cause of action set up by the defendants, and the suits were wholly without any foundation; that if the Society were compelled to defend each of the separate suits, it would be subjected to an enormous expense,"

by reason of which the Society sought to have the defendants enjoined from prosecuting their separate suits in the State Court, or endeavoring to collect in any other manner, any sums of money from the Society, by reason of the facts alleged. The District Court granted a motion of the defendants to dismiss the Society's bill for want of jurisdiction, because, jurisdiction being based on diversity of citizenship, the requisite jurisdictional amount was not present, since each of the defendants claimed in his suit in the State court, an amount less than $3,000.00. The Supreme Court, in setting aside said order, holding that the District Court was without jurisdiction to entertain plaintiff's bill, after stating the general rule that—

> "In a suit based on diversity of citizenship, brought against several defendants, to enjoin the collection of claims against the plaintiffs, which are separate and distinct — *although depending for thir vaidity upon a common origin*—the test of jurisdiction is the amount of *each separate claim*, and not their aggregate amount." (Italics ours)

said:

> "An exception to this general rule was, however, recognized in McDaniel vs. Traylor, 196 U. S. 415,

427. There the heirs of one Hiram Evans, an intestate, brought suit in the Circuit Court against several defendants to enjoin the enforcement of claims that had been allowed as liens upon his real estate by orders of a probate court. Each claim was less than the requisite jurisdictional amount, but their aggregate exceeded that sum. The bill alleged that these claims were not debts of the intestate, but that the defendants had *conspired and confederated* with the administrator to secure their payment out of the estate, and that the orders allowing them had been procured as the result of the *conspiracy and the fraud* practiced in pursuance thereof. This court reversed a decree of the Circuit Court dismissing the bill on demurrer for want of jurisdiction, and held that, on the face of the bill, the value of the matter in dispute was 'the aggregate amount of the claims *fraudulently* procured by the defendants *acting in combination* to be allowed in the probate court as claims against the estate.' * * * The essence of the suit is the *alleged fraudulent combination and conspiracy* to fasten upon that estate a liability for debts of John Evans, which were held by the defendants, and which they, *acting in combination* procured in cooperation with James Evans to be allowed as claims against the estate of Hiram Evans. *By reason of that combination*, resulting in the allowance of all those claims in the probate court, as expenses of administering the estate of Hiram Evans, *the defendants have so tied their respective claims together* as to make them, so far as the plaintiffs and the relief sought by them are concerned one claim." (Italics ours).

The Supreme Court, in its opinion in the *Woodmen of the World v. O'Neill* Case, supra, after quoting, as

above set out, from its decision in the *McDaniel v. Traylor* Case, said:

> "We find that under the allegations of the present bill, the case comes fairly within *the reason of the exception* recognized in the McDaniel cases. It is not only alleged that the defendants' claims are without foundation, but that they originated and are being prosecuted in the State court, in pursuance of an *agreement and conspiracy* to embarrass and to attempt to ruin the Society. * * * *To conspire to prosecute*, by concert of action, numerous *baseless claims against the same person for the wrongful purpose* of harassing and ruining, *partakes of the nature of a fraudulent conspiracy;* and in a suit to enjoin them from being separately prosecuted, it must likewise be deemed to *tie together* such several claims as one claim for jurisdictional purposes, making the aggregate amount the value of the matter in controversy. We conclude therefore, that on the face of the bill, the District Court had jurisdiction of the suit by reason of the diversity of citizenship and the amount in controversy."

* * * * *

The following additional cases discuss the exception to the general rule, announced in *W.O.W. v. O'Neill*, 266 U. S. 292:

Di Giovanni v. Camden Fire Ins. Ass'n., 296 U. S. 64;

Pioneer Pyramid Life Ins. Co. v. Hughey, et al, (C.C.A. 4th) 76 Fed. (2d) 524;

Indemnity Insurance Co. of North America v. School Dist. No. 1, etc. (C.C.A. 6th) 63 Fed. (2d) 878;

Georgia Power Co. v. Hudson (C.C.A. 4th) 49 Fed. (2d) 66.

* * * * *

In each of the above mentioned cases will be found a discussion of the exception to the general rule announced in the O'Neill Case, and in each of said four cases mentioned, the court expressed the opinion that the exception to the general rule announced in the O'Neill Case, was limited to those cases where it was alleged and proved a fraudulent conspiracy existed, thus tying together the causes of action.

An examination of the Respondent's petition will immediately disclose that Respondent does not seek to establish jurisdiction in this suit against the 26 defendants herein, whose respective liabilities are limited, under the guaranty sued upon, to $1,500.00 principal and $1,000.00 interest, on the ground that said 26 defendants fraudulently conspired or formed a combination, against which plaintiff seeks to relieve itself. Such being true, it therefore must be conceded that jurisdiction in this suit cannot be justified by reason of the exception to the general rule hereinbefore mentioned, that where a fraudulent combination or conspiracy is charged against the defendants, the cause of action sued upon is "tied together" as a result of the joint fraud or conspiracy charged, and the aggregate of the several amounts sought to be recovered from all defendants may be aggregated for the purpose of determining jurisdiction.

* * * * *

Closely akin, and almost a corollary to the foregoing exception (where a fraudulent conspiracy is charged) to the general rule that the separate liabilities of a number of defendants may not be aggregated to establish the required jurisdictional amount to enable a District Court of the United States to entertain a suit founded upon diversity of citizenship, is the following one announced in *Wyman v. Bowman*, 127 Fed. 257, that:

Where there is a common and decisive point of litigation between the Complainant and several defendants, and Complainant has no remedy at law as prompt, practical and efficient to attain the ends of justice as the suit in equity, and the convenience of the Complainant in pursuing the single suit in equity is not overcome by the deeper inconvenience of such a course to the defendants, a court of equity will entertain jurisdiction in order to avoid a multiplicity of suits.

The Supreme Court of the United States in *Di Giovanni v. Camden Ins. Ass'n.*, 296 U. S. 64, made the following comment upon the "multiplicity of suits" exception, above mentioned:

> "Whether a suitor is entitled to equitable relief in the federal courts, *other jurisdictional requirements being satisfied*, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give." * * *
>
> "*But want of the jurisdictional amount in*

controversy which deprives a federal court of its authority to act at law is not ground for invoking its equity powers. The statute forbids resort to equity in the federal courts when they afford adequate legal relief. It does not purport to command that equitable relief shall be given in every case in which they fail to do so. Plainly it does not so command when the want of legal remedy is due to the express prohibition of Congress, applicable alike to suits at law and in equity. See Healy v. Ratta, 292 U. S. 263. * * *

"Avoidance of the burden of numerous suits at law between the same or different parties, where the issues are substantially the same, is a recognized ground for equitable relief in the federal courts. See Ogden City v. Armstrong, 168 U. S. 224; Hale v. Allison, 188 U. S. 56. But the award of this remedy, as to other forms of equitable relief, is not controlled by rigid rules rigidly adhered to regardless of the end to be attained and the consequences of granting the relief sought. It rests in the sound discretion of a court of equity and a theoretical inadequacy of the legal remedy may be outweighed by other considerations. * * *

"The bare fact that a plaintiff is threatened with two suits on the same document and having common issues has been held not to be enough to call for their trial in a single suit in equity. Druon v. Sullivan, 66 Vt. 609; 30 Atl. 98. There appears to be no case in this court where the relief has been granted in such a case and there are numerous cases where equitable considerations were thought to require denial of the relief even though more than two suits were involved. See Matthews v. Rodgers, supra, 529, 530, and cases cited. * * *

"The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judicial sections of the Constitution. Congress, by its legislation, has declared its policy that cases involving less than the jurisdictional amount be left exclusive to the state courts, except that a judgment of the highest court of the State adjudicating a federal right may be reviewed by this Court. See Healy v. Ratta, supra, 269, 270. *Courts of equity, in the exercise of their discretionary powers, should recognize this policy by scrupulous regard for the rightful independence of the state governments; and a remedy infringing that independence, which might otherwise be given, should be withheld if sought on slight or inconsequential grounds.* See Williams v. Pennsylvania, 294 U. S. 176, 185; Matthews v. Rodgers, supra, 575; cf. Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky, 290 U. S. 264, 271-273; Kennedy v. Tyler, 269 U. S. 13.

"We think the threatened injury to respondent is of too slight moment to justify a federal court of equity, in the exercise of its discretion, in according a remedy which would entail denial of a jury trial to the petitioners and withdraw from the jurisdiction of the state courts suits which could not otherwise be brought into the federal courts." (Italics ours).

In applying the "multiplicity of suits" exception to the facts of the case at bar, there are two reasons why Petitioners feel that such exception is not relevant or applicable:

FIRST REASON: Respondent's Complaint filed in the United States District Court (R. 1-10) predicates jurisdiction upon diversity of citizenship (Par. I, R. 2) and the fact that the matter in controversy exceeded $3,000.00, exclusive of interest and costs (Par. II, R. 2). Nowhere in Respondent's Bill of Complaint is the right asserted that the United States District Court should entertain jurisdiction in order to avoid a multiplicity of suits in the State Court. Respondent not having claimed or asserted that the District Court of the United States had jurisdiction to entertain this action, in order to avoid a multiplicity of suits, petitioners respectfully submit that such claim cannot now be made.

SECOND REASON: Even though Respondent's Bill of Complaint had claimed, as a jurisdictional ground, the avoidance of a multiplicity of suits in the State Court, such claim would not have been well-founded, because under numerous decisions of the Supreme Court of Texas, one suit growing out of the same transaction, can be brought against several defendants in order to avoid a multiplicity of suits. In other words, the same equitable rule of the avoidance of a multiplicity of suits prevails in the State Courts of Texas, as in the Federal Courts. The "multiplicity of suits" rule in Texas is well stated in *Texas Jurisprudence*, Vol. 32, pages 38-41, as follows:

> "It is the practice of our courts to join as defendants all who are supposed to be liable to the plaintiff, although their liability may have accrued in different ways. That they may have no identity of interest to be affected by the judgment

is no objection to such joinder, for, in courts of equity, persons having different and even opposite interests are often made defendants. This rule has its origin in considerations of justice and convenience, and has for its object the prevention of circuity of action and *the multiplicity of suits.* Where the plaintiff's demands against each and all of those made defendants *grew out of one transaction* and are so intimately connected as to render it proper to determine all of the demands in one suit, undoubtedly there is no misjoinder of parties or of causes. The mere fact that the suit is an involved or complicated one, is not an objection to joinder of defendants, when the difficulty arises from the nature of the transaction, rather than from the manner of suing. * * * The right of the plaintiff to join a person who is liable under a contract with one who is responsible in tort, has been frequently recognized in cases where the liabilities could be conveniently litigated together. * * * It is to be borne in mind that our courts, in order to avoid a multiplicity of suits, are liberal in permitting the joinder of parties, when no prejudice thereby is sustained."

The right of a plaintiff to join a number of defendants in a suit brought in a State Court of Texas, where the several liabilities grow out of the same transaction, is recognized in many decisions of the Supreme Court of Texas, but the following should suffice:

Floyd v. Patterson, 72 Texas 202;
Cobb v. Barber, 92 Texas 309;
Richardson v. Cage Co., 113 Texas 152;
Stockyards National Bank v. Maples, 127 Texas 633, 637, and

Campbell v. Land, 69 S. W. (2d) 554 (writ of error denied by Supreme Court of Texas).

Petitioners quote the following from the decision in the last mentioned case, *Campbell v. Land:*

> "The reason given in the pleading filed by J. J. Land and his sureties for their dismissal was that the cause of action against Campbell and his surety was ex contractu, while that alleged against themselves was ex delicto. This is a mistaken view. Both arose out of a contract relating to precisely the same debt. The evidence is essentially the same in both cases. But one debt is involved, and all equities between the parties can be adjusted in one suit, and we are of the opinion that the trial court erroneously declined to assume jurisdiction over the cause of action alleged by both the executrix and appellants against Land and his sureties. This conclusion is supported by many authorities."

Applying the foregoing "multiplicity of suits" rule, prevailing in the courts of Texas to the facts of the case at bar, it goes without saying that Respondent had, and now has, the right to maintain one suit in a District Court of Texas (the jursidiction of which is $500.00 or over) against all of the twenty-six Petitioners herein who signed the contract of guaranty sued upon. It is not necessary for Respondent to seek relief in a United States District Court, in order to avoid a multiplicity of suits, which it might otherwise be required to bring in the State Court of Texas, because, as stated, the same "multiplicity of suits" rule obtains in the courts of Texas as in the Federal Courts.

Petitioners again repeat the solemn admonition given by the Supreme Court of the United States in the *Di Giovanni v. Camden Insurance Company* case, 296 U. S. 64, as follows:

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judicial sections of the Constitution. Congress, by its legislation, has declared its policy that cases involving less than the jurisdictional amount be left exclusive to the state courts, except that a judgment of the highest court of the State adjudicating a federal right may be reviewed by this Court. See Healy v. Ratta, supra, 269, 270. *Courts of equity, in the exercise of their discretionary powers, should recognize this policy by scrupulous regard for the rightful independence of the state governments; and a remedy infringing that independence, which might otherwise be given, should be withheld if sought on slight or inconsequential grounds.*"

* * * * *

A third exception to the general rule that the separate liabilities of a number of defendants may not be aggregated in determining and establishing the jurisdiction of a District Court of the United States, where the suit is founded upon diversity of citizenship, and the claim against each defendant does not meet the jurisdictional amount, is the following one:

Where a creditors's bill is brought in the District Court of the United States for the collection, administration and distribution, among all creditors of all

classes, of a trust fund, a District Court of the United States has jurisdiction, in such a suit filed against numerous defendants, although the amount sought to be recovered from each does not equal the required jurisdictional amount.

The opinion in the case of *Broderick v. American General Corporation*, 71 Fed. (2d) 864, contains an excellent discussion and analysis of the limited application of the exception mentioned. The suit was brought by Broderick, Superintendent of Banks of the State of New York, against stockholders, who resided in the State of Maryland, of a New York State Bank which had failed, to collect the total liability assessment made against them, pursuant to the law of New York, where the bank was incorporated. The bill was filed against sixty defendants, but against only six of them were judgments asked in excess of $3,000.00. Judge Parker, for the Fourth Circuit Court of Appeals, after pointing out that as to all of the defendants, save six, the recovery sought against each was not within the required jurisdictional amount, and that "the test of jurisdiction is the amount of each separate claim, and not the aggregate amount," proceeded to next discuss the question of whether, in such a situation, the bill asserted "equitable rights or asked equitable remedies which would give the court jurisdiction in equity, irrespective of the number of defendants." In discussing this question, Judge Parker, for the Fourth Circuit, said:

> "The bill certainly asserts no equitable right or title; and, in this, it is to be distinguished in the outset from creditors' bills such as in Alsop v.

Conway (188 F. 568) and Robertson v. Conway (188 F. 579) where the court was asked to *collect in and administer a trust fund* in which plaintiffs were interested. While there is an allegation in the bill that plaintiff acts as a fiduciary and trustee for creditors of the failed bank, *the court is not called upon to collect and administer a trust fund for their benefit.* Plaintiff merely asks recovery on a statutory liability; and any moneys collected by him under judgments which may be obtained, will be handled, *not under the direction of the court,* but pursuant to the provisions of the New York statute. The jurisdiction of the court to protect and administer *trust funds* then is not remotely involved." * * *

"The decree appealed from will therefore be reversed and the cause will be remanded with direction to the court below to dismiss the bill for lack of jurisdiction as to all defendants against whom a recovery not exceeding $3,000.00 is asked, etc."

* * * * *

Petitioners respectfully submit that jurisdiction in this suit cannot be sustained on the theory that it either is, or could be brought as a creditors' bill. As Respondent's petition now stands, it is brought solely and alone for the use and benefit of St. Louis Union Trust Company, which represents one group or class of creditors. It does not purport to be brought as a general creditors' bill in behalf of all creditors of the Young Men's Christian Association of Fort Worth, nor, indeed, is it even brought against the Young Men's Christian Association, but only certain defendants who signed a guaranty of an indebtedness cre-

ated by said Young Men's Christian Association. Moreover, Respondent's petition does not seek to have the court take charge of and administer the funds sought to be realized by such suit, but, on the contrary, asks only for the usual and customary judgment against a number of defendants who, it is alleged, promised and agreed to pay to plaintiff certain sums of money. It therefore is apparent that Respondent's petition, as filed, is not, and cannot be construed as a creditors' bill — hence jurisdiction cannot be maintained by reason of the second exception to the general rule above stated.

* * * * *

Furthermore, we submit that Respondent cannot, by amending its Bill, bring this case within the exception stated, because under the guaranty agreement attached to plaintiff's petition, plaintiff, St. Louis Union Trust Company, has the right to itself administer all recoveries that are had on the guaranty, distribute the net proceeds ratably, without any preference or priority of any kind, among the holders, present or future, of the principal or interest notes executed by the Young Men's Christian Association of Fort Worth. The express powers conferred by the guaranty agreement, attached to Respondent's petition, negative the conclusion that a court should take charge of and administer, as a trust fund, any recoveries had on the guaranty.

The same situation existed in the *Broderick v. American General Corporation* suit, 71 Fed. (2d) 864, above mentioned. Plaintiff, Broderick, brought said suit as a fiduciary and trustee for the creditors of a

failed bank, but the Circuit Court of Appeals for the Fourth Circuit refused to consider such a suit as a creditors' bill, because, as stated by the court in its opinion, "Plaintiff merely asks recovery on a statutory liability; and any moneys collected by him under judgments which may be obtained, will be handled, *not under the direction of the court*, but pursuant to the provisions of the New York statute. The jurisdiction of the court to protect and administer *trust funds* then is not remotely involved." (Italics ours).

* * * * *

APPLICATION OF THE GENERAL RULE TO THE FACTS INVOLVED.

Having demonstrated that jurisdiction, in this suit, cannot be maintained either (1) on the theory of "tying together" causes of action where a fraudulent conspiracy or combination of the defendants is charged or (2) on the theory of avoiding a multiplicity of suits or (3) upon the theory that a creditor's bill is brought to recover a trust fund to be administered by the court, the inquiry is narrowed down to one, and only one question, to-wit: Does the written guaranty attached to plaintiff's Bill impose upon the defendants a joint liability for an amount in excess of $3,000.00, exclusive of interest and costs.

If the liability of the several defendants, who signed the guaranty is a joint one, for an amount in excess of $3,000.00, exclusive of interest and costs, then Petitioners concede that the District Court has jurisdiction; but if, on the other hand, the guaranty does not

impose upon the defendants a joint liability in excess of $3,000.00, exclusive of interest and costs, then Petitioners respectfully submit the District Court was without jurisdiction to entertain this suit. What, then, is the meaning, effect and scope of the guaranty agreement upon which the liability of the several defendants is predicated?

Unless the guaranty agreement sued upon is subject to the construction that the signers bound themselves jointly and severally to the payment of $1,500.00 in principal, and $1,000.00 in interest (which construction will be later discussed) it is apparent that said guaranty agreement contains two inconsistent and irreconcilable provisions, viz:

The First: A provision under which "said undersigned guarantors, for themselves, their heirs, executors and administrators, do hereby jointly and severally guarantee unconditionally unto the St. Louis Union Trust Company * * * the payment of all and singular the sums due and to become due on each and all of said notes above described, both principal and interest, according to their respective tenor, purport and effect.

The Second: A provision whereby "No signer of this guaranty shall be liable for a greater amount of principal, or of interest, than the amounts respectively set opposite his signature, together with eight per cent (8%) interest per annum on so much thereof as he shall not pay when due."

In each case, as shown by the guaranty attached to plaintiff's Bill, the liability of each guarantor was

expressly limited to $1,500.00 of principal and $1,-000.00 of interest. (See preceding page 4).

By what process of reasoning can it be said that, in the face of this express limitation of liability to $1,-500.00 principal and $1,000.00 interest, nevertheless, the several guarantors were jointly liable for the entire $100,000.00 principal amount and $34,080.00 interest? The question answers itself. The only construction that can be given to the guaranty is that which limits the liability of each of the guarantors to the payment of $1,500.00 principal and $1,000.00 interest. Under this construction, the signers of the guaranty could be held jointly and severally liable for $1,500.00 principal and $1,000.00 interest, but for no more. For instance, if the indebtedness was paid down to $1,500.00 principal and $1,000.00 interest, then all signers would be jointly and severally liable for said sums: $1,500.00 principal and $1,000.00 interest, but this would not be sufficient to confer jurisdiction upon the District Court to entertain a suit to collect such amounts. Why then, would the District have jurisdiction to entertain this suit to establish 26 liabilities against 26 defendants, no one of which would be liable for more than $1,500.00 principal and $1,000.00 interest? It seems obvious that the District Court would not have jurisdiction of such a suit, for even concede that the liability of the 26 defendants is *joint*, it is only joint to the extent of $1,500.00 principal and $1,000.00 interest.

Plaintiff, in its Bill of Complaint, does not seek a joint recovery against defendants, for the entire amount of the balance of principal due ($73,500.00),

but only for $39,000.00 of the principal amount. It is therefore apparent that plaintiff has arrived at the $39,000.00 total liability of the 26 defendants by multiplying $1,500.00 (the limit of each defendant for principal) by 26 (the number of defendants), the total being $39,000.00. It would therefore seem that plaintiff has construed the contract of guaranty, not as imposing a joint liability upon defendants for the entire principal balance ($73,500.00), but as imposing upon the 26 defendants only a principal liability of $1,500.00 each, or a total of $39,000.00. This construction, in our judgment, is the only reasonable and logical one that can be adopted, because the guaranty agreement is so explicit, with respect to limiting the liability of each of the guarantors to $1,500.00 of principal and $1,000.00 of interest, and it would do violence to this expressed intention to enlarge the liability of the defendants so as to make them jointly responsible and liable for the entire amount of the original $100,000.00 principal and $34,080.00 interest.

If it is therefore conceded or assumed that the proper construction of the guaranty is that the guarantors limited their liability to $1,500.00 of principal and $1,000.00 of interest, then the other provision of the guaranty agreement under and by which the guarantors jointly and severally bind themselves to pay the entire principal indebtedness of $100,000.00, and interest indebtedness of $34,080.00 is meaningless and must be ignored, because, as previously stated, the two provisions with respect to the liability of the guarantors cannot exist under the same instrument at one and the same time.

Petitioners direct attention to the case of *Thorpe v. Story*, 73 Pac. (2d) 1194, which involved a guaranty very similar to the one in this case. The facts in the *Thorpe v. Story* case were substantially these: An action was brought by the members of a Bondholders' Protective Committee against eleven guarantors, to recover upon a written guaranty of a $350,000.00 bond issue of the Annadale Corporation, which guaranty recited that in consideration of the issuance and sale of $350,000.00 of First Mortgage 6½% Bonds of the Annadale Corporation, the guarantors, in consideration of the benefit derived by them as stockholders of said corporation, and to facilitate the sale of said bonds, and to protect the purchasers thereof, unconditionally guaranteed to the holders and purchasers of said bonds, from time to time, the punctual payment of both principal and interest thereon, at the time and place, and in the manner specified in said bonds, and the interest coupons thereto annexed. After reciting the foregoing obligation on the part of the guarantors, the guaranty continued:

> "It is provided however, as a condition hereof, that the obligation and liability of each of the undersigned hereunder, shall be limited in amount to the fraction of the total amount of principal and interest of said bonds set after his respective name, as follows * * *, and that each of the undersigned shall be liable hereunder in an amount equal to, but not in excess of, the respective aforesaid fractional amount of the entire principal and interest of said bonds. This guaranty is a continuing guaranty, and shall not be exhausted by one or more recoveries thereon, but shall bind us in the above proportions until payment has

been made in full of the principal and interest of said bonds. The holder of any bond may, from time to time, bring suit upon this guaranty, either by himself as plaintiff, or as plaintiff in conjunction with the holder of other bonds, and in any such suit, may join all, or any part of us as defendants."

The guaranty was signed by seventeen individuals, and their liability was in each case limited to a stated fraction of the entire amount of $350,000.00 bonds issued, and the interest accruing thereon. Default was subsequently made in the payment of the $350,000.00 bonded indebtedness, and the Trustee, in response to notice of default and demand, accelerated the outstanding bonds, making them immediately due and payable. Meanwhile, the owners of the bonds had organized a Protective Committee and a number of them had deposited their bonds in trust, under the terms of a Bondholders' Protective Agreement. The suit was filed by the members of the Bondholders' Protective Committee, to recover upon the guaranty as to the deposited, outstanding bonds in the aggregate principal sum of $216,000.00.

The defendants, who were the guarantors, contended that under the language of the guaranty sued upon, there existed a seveal liability, upon the part of each guarantor, for the guarantor's respective fractional proportion of the unpaid principal and interest upon the bonds sued upon, in which case plaintiffs would be entitled to a several judgment against each of the guarantors. Plaintiffs' contention, as stated in the court's opinion, was:

"Plaintiff's theory is that the guaranty consisted of two separate and distinct parts, the first and fundamental part being a joint and several guaranty of the entire obligation, both principal and interest, and the second part being the limitation in amount of liability of each of the guarantors; that, therefore, upon retirement of any bond, there would come into operation the 'joint' feature which would permit collection from each guarantor of an amount equal to his fraction of liability upon the retired bond, which amount could be applied to make up any deficit caused by other guarantors' inability to pay."

The Supreme Court of California, in construing the guaranty, said:

"The guaranty, in our view, imposes only a several liability, regardless of which method is used to compute it, and in reality, the judgment for which plaintiffs are asking is simply a several judgment against each defendant guarantor for his fraction of the entire indebtedness without deduction for retired bonds. But we find no warrant under the terms of the guaranty for holding any guarantor liable for more than his proportion of the unpaid indebtedness. Plaintiffs' argument seems strained, but it does not support any reasonable interpretation of the guaranty. The actual wording of the instrument, and its only clear and reasonable purport, imposes a several liability against the guarantors limited to fractional proportions of the outstanding unpaid indebtedness. The trial court used the proper method in computing the respective amounts awarded by the judgment, and properly denied plaintiffs' motion for an order vacating judgment and for the entry of another and different judgment."

Petitioners submit that the conclusion reached by the Supreme Court of California in the Thorpe Case, that the guaranty there involved, created a several, and not a joint liability, on the part of the guarantors, lends great weight and support to the contention made by the guarantors in the case now before this court, that their respective liability is a several one, limited to the payment of $1,500.00 principal and $1,000.00 interest, and, under no circumstances, can one guarantor be required to pay or contribute to the liability of another guarantor, for having once discharged his own limited liability by the payment of $1,500.00 principal and $1,000.00 interest, he could not be held responsible or liable for the failure of other guarantors to pay and discharge the respective amounts due and owing by them.

On the other hand, if the liability is a joint one then, at most, it is limited to the payment of $1,500.00 principal and $1,000.00 interest, which is not within the jurisdiction of the District Court.

* * * * *

Great stress was laid by Respondent in the Circuit Court of Appeals (pages 8-12) upon the case of *Miller v. Bush*, 24 S. W. (2d) 23, by the Commission of Appeals of Texas, wherein the court held that, *based upon the particular facts in that case*, the contract of guaranty sued upon created a joint and several obligation; hence pleas of privilege were not sustainable.

Respondent, in its brief in the Circuit Court, stated that the contract of guaranty in the *Miller v. Bush* case, is "practically identical" with the contract of guaranty in this case.

Although Petitioners do not agree that Respondent's statement is correct, nevertheless, for the sake of argument, they will assume that it is. What then is the result? All that we would then have in this case would be a joint liability of the twenty-six defendants (Petitioners herein) for the payment of $1,500.00 principal and $1,000.00 interest, which joint liability certainly would not be within the required jurisdictional amount (in excess of $3,000.00 exclusive of interest and costs), of a United States District Court.

This, in itself, should be a sufficient answer to the Respondent's contention that this case is controlled by the decision of *Miller v. Bush*, 24 S. W. (2d) 23, by the Commission of Appeals of Texas; for, as stated above, even if it be conceded that the guaranty sued upon in this case, created a joint liability on the part of the guarantors, still such joint liability does not meet the jurisdictional requirements of a United States District Court, because such joint liability is expressly limited to the payment of $1,500.00 in principal and $1,000.00 in interest, and concededly, a joint liability on the part of twenty-six guarantors to pay $1,500.00 of principal, would not be sufficient to confer jurisdiction upon a District Court of the United States, where diversity of citizenship is relied upon as a ground of jurisdiction.

However, Petitioners do not agree that the guaranty relied upon in this case is the same as in the *Miller v. Bush* Case, supra. Admittedly few cases, founded upon a contract of guaranty, present the same facts; each case must be decided upon its own merits.

Who can say with certainty that the Commission of Appeals of Texas, in the event the contract of guaranty involved in this case, was before that court, would hold that it created a joint liability? The language of the two guaranties is not the same; furthermore, in the *Miller v. Bush* Case, the Commission of Appeals of Texas was passing upon a *venue, not a jurisdictional question.* Let us therefore, examine and compare the language of the guaranty in the *Miller v. Bush* Case, with the guaranty in the case now before this Court.

The controlling provisions of the guaranty in the *Miller v. Bush* case, were as follows:

> "*We, and each of us,* agree to reimburse such Directors, or either of them, to the extent of the payment so made by them, or either of them, *our prorata part* of such amount so paid out by said Directors. It is understood and agreed, however, that none of us shall in any event be liable in a greater sum than the amount set opposite our names, being one-half the amount at par value of the stock now owned by us."

The guaranty agreement in the *Miller v. Bush* case was signed as follows:

"J. B. Earl ..... 10 Shares
T. J. Bush ..... 45 Shares
C. R. Miller ..... 500 Shares
G. H. Miller ..... 130 Shares
etc."

The controlling provisions in the guaranty agreement in the case now before this court, are:

> "Said undersigned Guarantors, for themselves, their heirs, executors and administrators do here-

by jointly and severally, guarantee unconditionally unto the St. Louis Union Trust Company, a Missouri corporation of St. Louis, Missouri, as trustee of an express trust, for the use and benefit of the holder or holders from time to time of the respective notes hereinbefore described, its successors and assigns, the payment of all and singular the sums due and to become due on each and all of the said notes above described, both principal and interest, according to their respective tenor, purport and effect: Provided, however, that no signer of this guaranty shall be liable for a greater amount than the amounts respectively, set opposite his signature, together with eight per cent (8%) interest per annum on so much thereof as he shall not pay when due." (R. 7-8) * * *

"In Witness Whereof, said undersigned have hereunto and to a duplicate copy hereof set their hands, and have subscribed against their respective signatures the *several amounts of their respective guaranties for principal and interest aforesaid.*

Signed in the presence of	Name of Guarantors	Respective Amounts of Interest Guaranteed	Respective Amounts of Principal Guaranteed
R. E. Squires	R. O. Dulaney	$1000.00	$1500.00
R. E. Squires	W. T. Ladd	1000.00	1500.00
R. E. Squires	C. P. Schenk	1000.00	1500.00
R. E. Squires	Wm. J. Baker	1000.00	1500.00"

etc. (R. 10)

The Commission of Appeals in the *Miller v. Bush* case, held that a *joint*, as well as several, obligation was created by the contract of guaranty in that case:

1. Because the words "*we, and each of us,*" as used in the contract of guaranty, imported a

joint undertaking or obligation on the part of the guarantors.

2. Because the words "*our pro rata part*" of the indemnity sum, imported a joint, as well as several obligation.

3. Because "regardless of the particular words employed, where a binding agreement of a number of parties with one another is to the effect that each will bear his proportionate part of a burden resting on the shoulders of one or more of them, a joint and several obligation, as between themselves, necessarily arises."

A careful reading of the controlling provisions in the contract of guaranty in this case, will immediately disclose that the contract of guaranty in this case is not the same as the contract of guaranty in the *Miller v. Bush* case.

It is elementary that a contract, like a will, must be construed from its four corners, so as to arrive at the true intention of the contracting parties. If this rule be followed, what force and effect should, and must, be given to the concluding paragraph in the contract of guaranty in this case, reading:

"In Witness Whereof, said undersigned have hereunto and to a duplicate copy hereof, set their hands, and have subscribed against their respective signatures *the several amounts of their respective guaranties for principal and interest aforesaid.*

Signed in the presence of	Name of Guarantors	Respective Amounts of Interest Guaranteed	Respective Amounts of Principal Guaranteed
R. E. Squires	R. O. Dulaney	$1000.00	$1500.00
R. E. Squires	W. T. Ladd	1000.00	1500.00
R. E. Squires	C. P. Schenk	1000.00	1500.00
R. E. Squires	Wm. J. Baker	1000.00	1500.00"

If we apply the rule of "common sense," in construing the contract of guaranty now before this court, it must be concluded that—

1. Petitioners herein, as guarantors, did not jointly guarantee the payment of the twenty-six promissory notes, aggregating, in the principal amount, $100,000.00, executed by the Young Men's Christian Association of Fort Worth; nor did

2. Petitioners herein, as guarantors, did not jointly guarantee the payment of $39,000.00 principal and $7350.00 interest on said notes, which appellant sues for, but,

3. On the contrary, each of appellees specifically guaranteed $1500.00 of principal and $1000.00 of interest on the indebtedness created by the Young Men's Christian Association.

By what process of reasoning can it be said that in the face of an express limitation of liability to pay $1500.00 principal and $1000.00 interest, nevertheless, the several guarantors, appellees herein, were jointly liable for either the entire $100,000.00 principal amount, and interest, represented by the notes executed by the Young Men's Christian Association of Fort Worth, or $39,000.00 in principal and $7350.00 in interest, sued for by appellant? The question answers itself!

The only construction that can be given to the guaranty is that which limits the liability of each of the guarantors to the payment of $1500.00 principal and $1000.00 interest. As and when each guarantor discharges this limited liability, he thereupon ceases to be liable for any further amount.

It is true, as hereinbefore pointed out, that the guaranty very properly may be construed as a *joint one* for the payment of $1,500.00 principal and $1,000,00 interest, but this would not result in conferring jurisdiction upon the District Court to hear and determine this case upon its merits; for, in order to confer jurisdiction upon the District Court there must be a joint *liability* of the defendants to pay to plaintiff more than $3,000.00 exclusive of interest and costs.

The *Miller v. Bush* Case, 24 S. W. (2d) 23, involved venue, not jurisdiction, and, in trying to apply its holding to this case, it should not be stretched to undue length.

* * * * *

In analyzing the reasons (R. 35-36) adopted by the Circuit Court of Appeals for its holding that the United States District Court had jurisdiction to entertain this suit (2nd par., R. 3, and 1st par., R. 4) one is immediately impressed with the fact that the Circuit Court apparently has not relied upon any of the hereinbefore mentioned exceptions to the general rule that the liabilities of several defendants may not be aggregated or tied together in order to meet the required jurisdictional amount of the United States

District Court; but, on the contrary, assigned the following as its reasons for the sustaining of jurisdiction of the United States District Court to entertain this suit:

> "Whether suing one or all of the guarantors, the plaintiff had to allege and prove the amount due under the default, which, according to the petition was a total of $80,500.00 principal and interest. The court likewise was compelled to adjudicate this issue, and to that extent and in that sense, the amount in controversy far exceeded its minimum jurisdiction." (R. 35). See Miller v. Bush (Texas), 24 S. W. (2d) 23; Delaware County National Bank v. King, 95 N. Y. S. 956.
>
> "Notwithstanding the limitation of maximum liability as to all defendants, to $2,500.00 each, by the very terms of the guaranty, they bound themselves to that extent, jointly and severally, to pay all of the principal and interest of the note so guaranteed. * * *
>
> "The plaintiff, to the maximum extent of their liability, could recover against one or all at its option, but in so doing, it would again have to allege, prove and have adjudicated as a condition precedent to recovery, the amount of default by the principal debtor." (R. 35).
>
> "There was a single contract of guaranty which all of the defendants signed and became parties to, in which they all promise the same thing to the guarantee, and as to him that obligation was indivisible, except as to the limitation upon his right to recover payment by any one of them of not more than $2,500.00. The subject matter of

> the suit was this contract. The whole amount due thereunder, as well as the extent of liability of each defendant, had to be determined by the lower court, and, having jurisdiction in view of the amount involved in the principal demand, it could and should decide all the other issues." * * * (R. 36).

It will be observed, in reading the opinion of the Circuit Court of Appeals, as above set out (R. 35-36), that no decision of the Supreme Court of the United States is cited by the Circuit Court as authority for the unprecedented doctrine announced by it that "the amount involved in the principal demand" (R. 36) and "the amount due under the default, which according to the petition was a total of $80,500.00 principal and interest" (R. 35) constituted the governing factors in determining the jurisdiction of the District Court to entertain this suit, notwithstanding that Respondent, in its Bill of Complaint, did not sue the principal obligor, Young Men's Christian Association, nor did it sue to recover the amount in default, $73,500.00 in principal and $7,350.00 in interest, or a total of $80,850.00, but, on the contrary, sued to recover judgment against the twenty-six defendants (Petitioners herein) "jointly and severally for the sum of $39,000.00 and for the sum of $7,350.00 interest, which interest plaintiff prays be prorated among the defendants according to the terms of said contract of guaranty." (R. 5).

It is an elementary principle of law that where an exhibit is attached to a pleading, and there is a conflict between the two, the exhibit will control (see Department of Justice headnote to case of American

Surety Company of New York v. Federal Reserve Bank of Kansas City, decided by the United States District Court for the Western District of Missouri, October 12, 1939; 29 Fed. Supp. 940):

We do not feel that the situation warrants any extended argument on our part to convince the court that the defendants in this suit are not, and cannot be made, jointly liable for the $39,000.00 principal amount claimed by plaintiff in its Bill, for, as stated, the guaranty agreement attached as an exhibit to plaintiff's Bill clearly and unmistakably establishes that the liability of each of the defendants in this case is expressly limited to the payment of $1,500.00 principal and $1,000.00 interest. The allegations contained in plaintiff's Bill, claiming and seeking to establish a joint liability against the defendants for $39,000.00 principal, must therefore be disregarded, because such claim is inconsistent and in conflict with, and contrary to the express provisions of the guaranty agreement, which, as stated, is attached to plaintiff's Bill as an exhibit.

This court will therefore construe Respondent's Bill of Complaint, to which the guaranty sued upon is attached, as an action for the recovery from each of the twenty-six defendants of $1,500.00 in principal, and 1/26th of the $7,350.00 interest alleged to be due. In this situation, can it be successfully maintained that the United States District Court has jurisdiction of this suit, merely because the amount due under the default by the principal debtor was $73,500.00 principal and $7,350.00 interest, and because it was necessary for the court to adjudicate this issue,

precedent to any recovery, notwithstanding, as above stated, the guaranty sued upon and attached as an exhibit to Respondent's Bill of Complaint, clearly and unequivocally confined and limited the amount of each guarantor to the payment of $1,500.00 principal and $1,000.00 interest (R. 8, last sentence first par., R. 10). Petitioners ask the indulgence of the court to repeat the following provisions taken from the guaranty agreement sued upon:

> "Provided, however, that no signer of this guaranty shall be liable for a greater amount of principal or of interest than the *amounts respectively set opposite his signature*, together with eight per cent (8%) interest per annum on so much thereof as should not be paid when due." * * * (R. 8).
>
> "In Witness Whereof, said undersigned have hereunto and to a duplicate copy hereof, set their hands, and have subscribed against their respective signatures the *several amounts of their respective guaranties for principal and interest aforesaid.*

Signed in the presence of	Name of Guarantors	Respective Amounts of Interest Guaranteed	Respective Amounts of Principal Guaranteed
R. E. Squires	R. O. Dulaney.....	$1000	$1500.00"

(Here follows like guarantees by twenty-five other guarantors. R. 10).

Petitioners submit that the above mentioned reasons, assigned by the Circuit Court of Appeals for the sustaining of jurisdiction of the United States District Court to entertain this suit, are not only un-

supported by, but run counter to, and are in conflict with the decisions of this court in the following cases:

Ex Parte Phoenix Insurance Company, 117 U. S. 367;
Wheeler v. Cloyd, 134 U. S. 537;
Wheless v. St. Louis, 180 U. S. 379, 382.

In the first case mentioned, *Ex Parte Phoenix Insurance Company*, 117 U. S. 367, suit was brought on a single instrument, by which it was adjudged an agent of several insurance companies named bound them severally, each for its proportionate share of one-fourth to insure the property of Mrs. Helen M. Fitton for $12,000.00, and decree was rendered against each Company separately for $3,433.50. The trial court rendering the judgment denied the defendants the right of appeal, because the recovery against each of the defendants was less than $5,000.-00, the jurisdictional amount then required to appeal, and this court, in sustaining the trial court's action, held that the fact that suit was brought on a single insurance policy for $12,000.00, which provided for its apportionment among four companies, could not be availed of as a ground for justifying appellate jurisdiction. If the reasoning adopted by the Circuit Court of Appeals in the case at bar had been followed by this court in Ex Parte Phoenix Insurance Company, supra, an appeal would have been allowed on the ground that the $5,000.00 jurisdictional amount required for appeal, should be determined, not by the amount of the judgment sought and recovered against each defendant, but by the fact, as stated in the opinion of the Circuit Court, that, in order to recover, it

was necessary to "allege, prove, and have adjudicated as a condition precedent to recovery, the amount of default" by all debtors, before there could be an apportionment between them, or, as expressed again by the Circuit Court "the subject matter of the suit was this contract. The whole amount due thereunder, as well as the extent of liability of each defendant, had to be determined by the lower court, and having jurisdiction, in view of the amount involved in the principal demand, it could and should decide all the other issues." However, this court, in *Ex Parte Phoenix Insurance Company*, supra, in principle, declined to follow this reasoning, holding that the $5,000.00 jurisdictional amount required, was determined not by the amount of the principal demand, before apportionment among the several defendants, but by the amount of the respective judgments sought to be, and actually recovered against the several defendants, no one of which alone came within the required $5,000.00 jurisdictional amount.

In the second case above mentioned, *Wheeler v. Cloyd*, 134 U. S. 537, this court sustained a motion to dismiss the appeal, because the liability of no one of the defendants exceeded $5,000.00 (the jurisdictional amount then required for appeal), on the ground that their combined or aggregate liabilities could not be resorted to to sustain the right of appeal; this court, in its opinion, saying:

> "It is clear that the appeal must be dismissed. The decree from which it is taken was not a joint decree, as is readily observed by a mere inspection of it. The liability of each one of the defendants

under that decree can be neither increased nor diminished by any action on the part of any of his co-defendants. The right of every one of the defendants to appeal from the decree is separate and distinct from that of the other defendants. The amount adjudged against any one of them, in order that he might redeem his respective tract or tracts of land, does not in any case reach the amount necessary to give us jurisdiction to entertain the appeal. In no case is it $5,000.00."

In the third case, *Wheless v. St. Louis*, 180 U. S. 379, this court, in an opinion by Chief Justice Fuller, defined "amount in controversy," equivalent to the "amount in dispute" as follows:

> "The 'matter in dispute' within the meaning of the statute is not the principle involved, but the pecuniary consequence to the individual party, dependent on the litigation, as, for instance, in this suit the amount of the assessment levied, or which may be levied, *as against each of the complainants separately*. The rules of law which might subject complainants to or relieve them from assessment would be applicable alike to all, but each would be so subjected, or relieved, in a certain sum, and not in the whole amount of the assessment. If a decision on the merits were adverse to the assessment, each of the complainants would be relieved from payment of less than two thousand dollars. If the assessment were sustained, neither of them would be compelled to pay so much as that." (Italics ours).

Petitioners also call attention to the case of *Vance v. Vandercook Co.*, 170 U. S. 438, and particularly to paragraph on page 472, reading as follows:

> "In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum. Barry v. Edmunds, 116 U. S. 550, 560; Wilson v. Daniel, 3 Dall. 401, 407."

Petitioners also call attention to the very useful work of *Williams on Jurisdiction and Practice of Federal Courts*, Section 13, page 95, wherein the author says:

> "Generally speaking, then, in an action at law for the recovery of a money judgment, the amount in controversy is the amount of money sought in good faith to be recovered by an integral plaintiff against an integral defendant."

Petitioners submit that if the above mentioned and well recognized principles for determining the "amount in controversy" are applied to the case at bar, this court will readily conclude that the Circuit Court of Appeals has seriously erred in predicating and sustaining jurisdiction upon "the amount due under the default" or "the amount of default by the principal debtor," or "the amount involved in the principal demand" (all three terms being used in the court's opinion), because, as clearly stated by this Court in *Wheless v. St. Louis*, "The 'amount in dispute' within the meaning of the statute, is not the principle involved, but the pecuniary consequences to the individual party, dependent on the litigation." What,

then, is the pecuniary consequence to the individual party defendants in this case? Concededly, it is and will be a judgment requiring each to pay $1,500.00 in principal and $1,000.00 in interest; the respective amounts guaranteed by each of the parties signing the guaranty sued upon, and no more.

In the *Wheless v. St. Louis* Case, supra, this court said:

> "If a decision on the merits were adverse to the assessment, each of the complainants would be relieved from payment of less than $2,000.00. If the assessment were sustained, neither of them would be compelled to pay so much as that." (280 U. S. at p. 382).

When the rule just announced is applied to the case at bar, the result may be thus stated: If a decision on the merits is adverse to Respondent, each of the Petitioners will be relieved from the payment of less than $3,000.00 (in fact, the maximum liability of each is limited to the payment of $1,500.00 in principal and $1,000.00 in interest). If Respondent is successful in this suit, none of the defendants will be compelled to pay as much as $3,000.00 (the liability of each being expressly limited in the guaranty agreement to the payment of $1,500.00 in principal and $1,000.00 in interest).

Petitioners feel that the reasons assigned by the Circuit Court of Appeals, as set forth in its opinion in this case, for determining the "amount in controversy," as used in Section 41, Title 28, U. S. Code Annotated, are so inconsistent with and foreign to those previously announced by this court, that no

further argument is necessary to establish Petitioners' contention that the Circuit Court of Appeals has erroneously decided an important jurisdictional question contrary to the long established decisions of this court.

CONCLUSION

Petitioners submit that the policy of the Federal Government, as reflected both in Legislative Acts and judicial construction, has been to curtail and discourage Federal Courts' concerning themselves with controversies that do not present a Federal question. This attitude is clearly reflected in the admonition given by this court in the *Di Giovanni Case*, 296 U. S. 64, that—

> "Congress, by its legislation, has declared its policy that cases involving less than the jurisdictional amount be left exclusively to the State courts. * * * Courts of equity, in the exercise of their discretionary powers, should recognize this policy by scrupulous regard for the rightful independence of the State Governments, and a remedy infringing that independence, which might otherwise be given, should be withheld, if sought on slight or inconsequential grounds."

Counsel for Petitioners submits that the decision of the Circuit Court of Appeals in the case at bar is out of harmony with the prevailing legislative and judicial policy of the National Government to leave to the State Courts the determination of controversies that do not clearly come within the express provisions of the Judicial Code, and since the adoption of the New Federal Rules of Civil Procedure, abolishing the distinctions

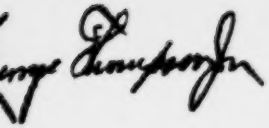
previously existing between courts at law and courts in equity, the Federal Courts should follow a policy of "scrupulous regard for the rightful independence of the State Governments and a remedy infringing that independence which might otherwise be given, should be withheld if sought on slight or inconsequential grounds" (substantially the doctrine announced in the Di Giovanni Case).

As hereinbefore pointed out, under the settled rules and practice and decisions of the Texas Courts, Respondent can bring one suit in a District Court of Texas against all of the twenty-six guarantors who signed the guaranty agreement sued upon in this action. The District Court of Texas will have jurisdiction of such suit, because the minimum jurisdictional requirement for a suit in such court is $500.00. (Article 1906, Revised Civil Statutes of Texas). The liabilities of each of the twenty-six guarantors, Petitioners herein, can be determined in such a suit, and Respondent as plaintiff in such action, will enjoy the same rights to judgment and the collection of same, as it would have in the Federal Courts. Such being the case, Petitioners submit that the resort of Respondent to a United States District Court to enforce against each of the twenty-six defendants, Petitioners herein, a liability limited as to each defendant, to $1,500.00 in principal and $1,000.00 in interest, comes within the ban laid down in the opinion of this Court in the *Di Giovanni Case*, 296 U. S. 64.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its super-

visory powers, that the Petition for Writ of Certiorari should be granted, and upon final hearing, the decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 130

JOE C. STEPHENS et al.,
Petitioners,

vs.

ST. LOUIS UNION TRUST COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. .....

JOE C. STEPHENS et al.,
Petitioners,

vs.

ST. LOUIS UNION TRUST COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Respondent St. Louis Union Trust Company respectfully urges that the Petition for Writ of Certiorari should not issue in this case for the following reasons:

1. The judgment of the Circuit Court of Appeals herein reversed the judgment of the District Court and remanded the case for further proceedings according to law, such judgment not being a final decision, or one upon which a Writ of Certiorari will issue.

2. The sole question involved in Petitioners' Application for Writ of Certiorari is controlled by State Law and the decision of the Circuit Court of Appeals is in conformity with that law as announced by the Supreme Court of Texas.

3. The decision of the Circuit Court of Appeals is correct not only according to the law of the State of Texas, but according to the general law, and is not contrary to long-established decisions of the Supreme Court and to **Ex Parte Phoenix Insurance Company**, 117 U. S. 367; **Wheeler v. Cloyd**, 134 U. S. 537, and **Wheless v. St. Louis**, 180 U. S. 379, as stated by Petitioners in their Application for Writ of Certiorari.

FIRST REASON.

STATEMENT, ARGUMENT AND AUTHORITIES.

Facts: The Circuit Court of Appeals reversed and remanded this case. Quoting from the opinion of that Court:

> "As stated, the plaintiff's (Respondent's) action was against all of the twenty-six Guarantors (Petitioners) in the Court below, The Young Men's Christian Association principal not being made party. Motions to dismiss for want of jurisdiction on behalf of all defendants were made based upon the proposition that none of their obligations exceeded $2,500.00, and, hence, could not be lumped together to make up the required minimum of $3,000.00. These Motions were first overruled, but later sustained by the lower court and the suit dismissed.
>
> "It is our view that this ruling was incorrect. • • • **The judgment is reversed and the cause remanded for further proceedings according to law**" (R. 35, 36).

5 Cyc. Fed. Proc. 925:

> "Rulings upon pleas or objections to the jurisdiction of the court may sustain an appeal where the decision is **against** the court's jurisdiction and the case for

that reason dismissed. But where such plea or objection is overruled the case proceeds to final judgment on the merits before an appeal can be taken on the question, and so **no appeal lies from an order of the Federal Court refusing to dismiss the case for want of jurisdiction.**" Citing Gates v. Bucki, 53 F. 961; Mann v. Gaddie, 158 F. 42.

5 Cyc. Fed. Proc. 973:

"The writ (of certiorari) cannot be issued to require the court to send up a cause over which it has no jurisdiction for determination on the merits **and will not issue to review a judgment of the Circuit Court of Appeals reversing a judgment of the lower court and remanding the cause for further proceedings, such not being a final decision,**" citing Chicago & N. W. Ry. Co. v. Osborne, 146 U. S. 354, 36 L. Ed. 1002, 13 Sup. Ct. 281; Rice v. Sanger, 144 U. S. 197, 36 L. Ed. 403, 12 Sup. Ct. 664, and Meagher v. Minnesota Thrasher Mfg. Co., 145 U. S. 608, 36 L. Ed. 834, 12 Sup. Ct. 876.

In **Chicago & N. W. Ry. Co. v. Osborne**, 146 U. S. 354, 36 L. Ed. 1002, Osborne, as plaintiff below, sued the Railway Company for damages. Judgment was rendered in his favor and the Railway Company sued out its writ of error to the Circuit Court of Appeals. That court rendered its opinion "reversing the judgment of the said United States Circuit Court for the Southern District of Iowa, and remanded the case for further proceedings in accordance with its opinion." Osborne filed his petition in the Supreme Court for Writ of Certiorari. The Supreme Court, speaking through the Chief Justice, after stating the foregoing facts, said:

"The petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit are denied. McLish v. Roff, 141 U. S. 661 (35:893); Rice v. Sanger, 144 U. S. 197 (36:403); Meagher v. Minnesota T. Mfg. Co., 145 U. S. 608 (36:837)."

McLish v. Roff, 141 U. S. 661, 35 L. Ed. 893, involved an application to the Supreme Court for writ of error to a District Court to review an order of the latter court overruling a demurrer to the jurisdiction. The writ of error was taken under the Act of March 3, 1891 (26 Stat. at L. 826), Section 5 of which provides:

> "That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Mr. Justice Lamar, speaking for the Court, said:

> "Does this provision authorize an appeal or writ of error to be taken to this court for review of a question involving the jurisdiction of the court below, whenever it arises in the progress of a case pending therein; and does the taking of such appeal or writ of error operate to stay the further proceedings in the cause until the determination by this court of the jurisdictional question? Or, in other words, has this court jurisdiction to review the question before any final judgment in the cause?
>
> "The plaintiff in error contends that we have the jurisdiction to review such question, because (1) there is in the section above quoted no express requirement of finality of judgment; and (2) because there is a positive requirement that the question of jurisdiction shall alone be certified to the Supreme Court from the court below for decision. * * *
>
> "We think that upon sound principles of construction such is not the meaning of the Act of Congress under consideration. It is manifest that the words in section 5, 'appeals or writs of error,' must be understood within the meaning of those terms as used in all prior Acts of Congress relating to the appellate powers of this court, and in the long standing rules of prac-

tice and procedure in the federal courts. Taken in that sense, those terms mean the proceedings by which a cause, in which there has been a final judgment, is removed from a court below to an appellate court for review, reversal or affirmance. * * *

"From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error (with the single exception of a provision in the Act of 1875 in relation to cases of removal, which was repealed by the Act of 1887), have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. Forgay v. Conrad, 47 U. S. 6 How. 201, 204 (12:303, 304). The construction contended for would render the Act under consideration inconsistent with this long established object and policy. * * *

"The writ of error is dismissed."

Other potent arguments in support of the conclusion of the court are advanced in the opinion, but will not be reproduced here.

The reasoning in the McLish v. Roff case, supra, was followed in the more recent case of **Schoenamsgruber v. Hamburg American Line**, 294 U. S. 454, 79 L. Ed. 989. Mr. Justice Butler, speaking for the court, said:

"The Act of April 3, 1926, 44 Stat. at L. 233, chap. 102, U. S. C. title 28, sec. 227, added to sec. 129 a provision granting appeal 'from an interlocutory decree in admiralty determining the rights and liabilities of the parties.' This specification, taken in connection with the other parts of the section, indicates that Congress did not intend to make appealable any other interlocutory decrees in admiralty. Moreover, there is nothing to indicate that Congress intended to allow repeated appeals in the class of cases to which these belong. That would be contrary to its long-established policy. The orders under consideration may be re-

viewed on appeal from the final decree." Citing the McLish v. Roff case, supra.

Gates v. Bucki (C. C. A., 8th Cir.), 53 F. 961:

"If the bill should be dismissed for want of jurisdiction, then the appeal would be to the supreme court, and not to this court. If the plea to the jurisdiction should be overruled, then the case must proceed to a final decree on the merits before any appeal could be taken on the jurisdictional question, it being then open to the defendant Gates to go to the supreme court on the single question of jurisdiction, or to bring the entire case before this court. McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. Rep. 118."

Mann v. Gaddie (C. C. A., 5th Cir.), 158 F. 42:

"A motion was made by the defendant Mann to dismiss the bill for want of jurisdiction. We find in the record, also, a plea to the jurisdiction of the court. There is no decree on either the motion or the plea. In the argument at the bar it was assumed that the court had overruled these defenses. If that were true, and it so appeared in the record, no appeal could be taken from such orders. The court having refused to dismiss the case for want of jurisdiction, the defendant objecting to the jurisdiction must wait till a final decree before he is allowed an appeal. 2 Foster's Fed. Prac. (3d Ed.), sec. 503."

Under the foregoing authorities, and particularly the reasoning set forth in the McLish v. Roff case, we submit that the Supreme Court should not issue a Writ of Certiorari in this case.

SECOND REASON.

STATEMENT, ARGUMENT AND AUTHORITIES.

Facts: Respondent sued some twenty-six defendants (Petitioners) for $39,000.00 of principal and $7,350.00 of interest upon a written contract of guaranty which provides as follows:

It recites that the Y. M. C. A. has applied to the First National Company for a loan of $100,000.00 to be evidenced by twenty-six promissory notes secured by a Deed of Trust upon certain real estate situated in Fort Worth; that

> "Whereas, said First National Company is willing to make or procure said loan upon condition that the undersigned (hereinafter sometimes called the Guarantors) execute **this guaranty in the form hereof; otherwise not**" (R. 6); * * * that
>
> "Whereas, for the purpose of consummating the said loan, the undersigned, said Guarantors, are willing, in consideration of said First National Company making or procuring said loan as aforesaid, to execute **this** guaranty in the form of this instrument.
>
> "Now, therefore, in consideration of the premises and in order to induce said First National Company to make or procure said loan for itself or for the account of its clients or future holders thereof and for other good and valuable considerations, said undersigned Guarantors, for themselves, their heirs, executors and administrators, do hereby, **jointly and severally**, guarantee unconditionally unto the St. Louis Union Trust Company, a Missouri corporation of St. Louis, Mo., as Trustee of an express trust, for the use and benefit of the holder or holders from time to time of the respective notes hereinbefore described, its successors and assigns, the payment of **all and singular** the sums due and to become due **on each and all of the said notes** above described, both principal and interest, according to their respective tenor, purport and effect: **Provided, however, that no signer of this guaranty shall be liable for a greater amount of principal or of interest than the amounts respectively set opposite his signature**, together with 8% interest per annum on so much thereof as he shall not pay when due (R. 7-8). * * *
>
> "In case default shall be made by said The Young Men's Christian Association of Fort Worth, Texas, in

> the payment of principal or interest or any part thereof, when due by lapse of time or acceleration of maturity thereof under the terms and conditions of said mortgage deed of trust or otherwise, of or on any notes aforesaid, then and thereupon **the obligation** of the Guarantors, and each of them, by reason of **this** guaranty shall immediately become effective, anything in this guaranty or in said notes and/or deed of trust to the contrary notwithstanding, and **all** principal of and accrued or earned interest on all principal and interest notes then outstanding and unpaid **shall constitute and be a direct obligation of the Guarantors and each of them,** payable upon demand therefor to said St. Louis Union Trust Company, as Trustee, its successors or assigns" (R. 8-9);

that all moneys collected by said Trustee under said guaranty should after the deduction of expenses—

> "Be applied by said Trustee toward payment of the amounts due and unpaid upon the principal and interest notes aforesaid then outstanding, respectively, ratably and without any preference or priority of any kind, according to the amounts due and payable upon such principal and interest notes at the time fixed by said Trustee for the distribution of such moneys" (R. 9);

then follows the signature of the twenty-six Petitioners herein with the sums of $1,000.00 and $1,500.00 set opposite the name of each, under respective columns entitled—

> "Respective amounts of interest guaranteed" and "Respective amounts of principal guaranteed" (R. 10).

Mr. Justice Harlan, speaking for the Court in **McDaniel v. Traylor**, 196 U. S. 415, 49 L. Ed. 533, quoted with approval the following from Walter v. Northeastern R. Co., 147 U. S. 370, 37 L. Ed. 206:

> "It is well settled in this court that * * * when two or more defendants are sued by the same plaintiff

in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff."

1 Cyc. Fed. Proc. 963:

"The character of plaintiff's cause of action as joint, joint and several, or several, is of paramount importance on the issue of a separable controversy. In passing upon the matter the federal court will follow the state rule as to whether the cause of action is entire or not, for the question of joint or several liability of defendants is determinable by the local law." (While this statement was made in connection with a discussion of "removal of causes from state courts," nevertheless we submit that the reasoning in the instant case is the same.)

Mr. Justice Holmes, in **Chicago, R. I. & P. R. Co. v. Schwyhart**, 227 U. S. 183, 57 L. Ed. 473, in discussing the question of whether the liability of the defendants was joint or several, said:

"The joint liability of the defendants under the declaration as amended is a matter of state law, and upon that we shall not attempt to go behind the decision of the highest court of the state before which the question could come."

Chicago, R. I. & P. R. Co. v. Whitaker, 239 U. S. 421, 60 L. Ed. 360:

"The supreme court of the state decided that the petition stated a (joint) cause of action against Drake and the railway company, and whether it did, we said in Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, 57 L. Ed. 473, 33 Sup. Ct. Rep. 250, was a matter of state law."

The two preceding quotations were quoted with approval in **Pullman Company v. Jenkins**, 305 U. S. 534, 83 L. Ed. 334.

The question of whether or not the liability of Peti-

tioners under a contract of guaranty similar to the one here involved is joint or several has been decided against Petitioners by the Supreme Court of Texas, and the law on that question is now well settled in Texas. The case of **Miller v. Bush**, 24 S. W. (2d) 23, decided by the Commission of Appeals of Texas, opinion adopted by the Supreme Court of Texas, is so similar to the instant case that we report it rather fully:

> "Waco Twine Mills, a corporation, was in financial straits, and, in order to help it out of its difficulty, the stockholders executed the following contract of guaranty:
>
> " 'The State of Texas, County of McLennan.
>
> " 'We, the undersigned stockholders of the Waco Twine Mills, in order to induce the directors of said corporation to properly finance the same by borrowing money on the credit of the Twine Mills with their endorsement, or in such other manner as to them may seem for the best interest of said mill, have agreed and here now agree that in event the directors of said corporation should by reason of such endorsement be required to pay any sum or sums of money, then we, and each of us, agree to reimburse such directors, or either of them, to the extent of the payment so made by them, or either of them, our pro rata part of such amount so paid out by the said directors.
>
> " ' **It is understood and agreed, however, that none of us shall in any event be liable in a greater sum than the amount set opposite our names,** being one-half the amount at par value of the stock now owned by us. * * *
>
> " '(Signed)
>
> | | |
> |---|---|
> | " 'J. B. Earle | 10 shares |
> | " 'T. J. Bush | 45 shares |
> | " 'C. R. Miller | 500 shares |
> | " 'G. H. Connell | 130 shares |
> | " 'J. M. Penland | 18 shares * * *.' |

etc., containing a list of all the stockholders with the number of shares of each set opposite his name.

"The directors borrowed $65,000.00 upon their personal indorsements. The corporation defaulted in the sum of $37,000.00. The directors asked the stockholders to pay their respective proportionate parts and all but six did. This was a suit filed in the District Court of McLennan County by the directors against five of the six defaulting stockholders for $22,378.00. Two of the defendants filed pleas of privilege to be sued in Dallas County, the County of their residence. Plaintiffs controverted said pleas of privilege **upon the ground that these two defendants were sued jointly on a joint and several contract,** entered into by all of the defendants, one of which defendants was a resident of McLennan County. Said two defendants contended that the liability incurred by them respectively by signing the obligation hereinbefore set out was **several, and not joint.**

"The Commission of Appeals said:

> " 'Respecting the indemnity to which the contract relates, the first paragraph of the instrument provides:
>
> " ' "We, and each of us, agree to reimburse such directors, or either of them, to the extent of the payment so made by them, or either of them, our pro rata part of such amount so paid by the said directors."
>
> " 'Liability for "our pro rata part" of the indemnity sum—that is to say, the pro rata part of every signer, including the directors—is, by appropriate language, imposed on each signer severally and on all jointly. **Nothing can be found anywhere in the instrument, or in the general nature of the transaction disclosed by its terms, which would justify the belief that the integral term, "we and each of us," as used in this clause, was intended to bear any other than its**

usual signification. On the contrary, when this entire clause is considered in the light of the language preceding it—which language discloses the occasion for the making of the contract, and the common interest of all the contracting parties in the subject matter—an intention to create a joint and several obligation on the part of the signers of the instrument, as between themselves, becomes manifest.

" 'Moreover, it occurs to us that, regardless of the particular words employed, where a binding agreement of a number of parties with one another is to the **effect** that each will bear his proportionate part of a burden resting on the shoulders of one or more of them, a joint and several obligation, as between themselves, necessarily arises. For the necessary effect of such an agreement is to bind the parties to one another for the performance of the several promises of all. * * *

" '**The contract under consideration creates a joint and several obligation. The clause next succeeding the one we have quoted does not affect the nature of this obligation. This clause has effect simply to restrict, as to amount, the liability of the several parties.**' "

Note the similarity between the contracts of guaranty in the Miller and the instant cases. To all intents and purposes we submit that they are practically identical. The contract in the Miller case provides that "We, and each of us, agree to reimburse * * *," while the contract in the instant case provides that "Said undersigned Guarantors * * * do hereby jointly and severally guarantee * * *." The clauses limiting the liability are almost identical in both contracts, the one in the Miller case reading, "None of us shall in any event be liable in a greater sum than the amount set opposite our names";

while the one in our case reads, "Provided, however, that no signer of this guaranty shall be liable for a greater amount of principal or of interest than the amounts respectively set opposite his signature." There is no difference between the Miller contract and the one in the instant case by reason of the expression "our pro rata part" in the former. See **Delaware County National Bank v. King** (Supreme Court of New York), infra.

The contract in the instant case recites the circumstances out of which it grew, showing the interest of the parties therein; it recites that:

> "Whereas, said First National Company is willing to make or procure said loan upon condition that the undersigned (hereinafter sometimes called the Guarantors) execute this guaranty in the form hereof; otherwise not; and * * *
>
> "Whereas, for the purpose of consummating the said loan, the undersigned, said Guarantors, are willing, in consideration of said First National Company making or procuring said loan as aforesaid to execute this guaranty in the form of this instrument."

It then uses this language:

> "Said undersigned Guarantors, for themselves, their heirs, executors and administrators, do hereby **jointly and severally**, guarantee * * * the payment of all and singular the sums due and to become due on each and all of the said notes above described,"

and then follows the clause limiting the liability of each Guarantor as above quoted. The contract of guaranty is referred to in the singular person as "this guaranty," and not "these several guaranties" in many places throughout. Another important clause is the one to the effect that:

> "In case default shall be made by said The Young Men's Christian Association * * * then and there-

> upon the obligation of the Guarantors, and each of them, by reason of this guaranty shall immediately become effective * * * and all principal of and accrued or earned interest on all principal and interest notes then outstanding and unpaid shall constitute and be a direct obligation of the **Guarantors and each of them.**"

We cannot understand what the parties to the contract of the guaranty in the instant case meant when they said, "Said undersigned Guarantors * * * do hereby **jointly and severally** guarantee * * *," if they did not mean what they said, i. e., that their liability under said contract was to be joint and several. As if to remove any doubt from the question, after using the clause limiting the liability of each signer to the amount set opposite his name, they followed it up with the statement that in case of default then "the obligation of the **Guarantors, and each of them,** by reason of this guaranty, shall immediately become effective."

Furthermore, Mr. Justice Day, speaking for the court in **Cincinnati, N. O. & T. P. R. Co. v. Bohon,** 200 U. S. 221, 50 L. Ed. 448, said:

> "A state has an unquestionable right by its Constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff, in due course of law and in good faith, has filed a petition electing to sue for a joint recovery given by the laws of the state, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a nonresident defendant therein, properly joined in the action under the Constitution and laws of that state wherein it is conducting its operations, and is duly served with process."

Article 1986, Revised Statutes of Texas 1925, provides that:

> "The acceptor of a bill of exchange, or a principal obligor in a contract, may be sued either alone or jointly with any other party who may be liable thereon; * * *."

Under the terms of the contract of guaranty in the instant case Petitioners became liable as principals upon the default of the Y. M. C. A. (R. 8, 9). If the State of Texas has the right to enact such a statute as Article 1986, as is held in the Bohon case, supra, then Respondent in this suit has exercised its lawful privilege in joining all Petitioners in a single suit. If after having done this it may be compelled to submit to a severance and removal to the State Courts at the instance of the Petitioners, the local law as to that extent is annulled. It is clear, we submit, from the language used in the Bohon case, that the Federal Courts have no such power of annullment.

THIRD REASON.

The decision of the Circuit Court of Appeals is correct not only according to the Laws of the State of Texas, but according to the general law of the land, and is not contrary to the decisions cited by Petitioners in their brief, as stated by them, because:

(a) It is the general law of the land that the liability of guarantors under a contract of guaranty similar to the one here involved is joint and not several,

(b) Even if it be considered that the liability is several and not joint, which we say is incorrect, even then Petitioners have so tied themselves and their respective interests in the subject matter together as to make them in reality a single claim or subject matter and Respondent had the right to join all such interests or claims together

in a single suit, making their aggregate amount the value of the matter in controversy for jurisdictional purposes,

(c) Even though it be held that Respondent has twenty-six separate actions of law against the twenty-six separate Petitioners herein, which it should not be held, Respondent would have the right in equity to join together said several claims for jurisdictional purposes in order to avoid a multiplicity of suits, and

(d) There is no conflict between the decisions of the Circuit Court of Appeals in the instant case and that of the Supreme Court in the case cited by Petitioners as the ground for the issuance of the Writ of Certiorari herein.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER THIRD REASON (a).

While we have been unable to find any case among the federal decisions dealing directly with the effect of a clause limiting the liability of each of a number of signers of a contract of guaranty, nevertheless we submit that the general rule as announced in the following State Court decisions is the correct one, supported by the better reasoning, and will be followed by the Federal Courts. In fact, the only case holding to the contrary which we have been able to find is that of **Thorpe v. Story**, by the California Court, 73 Pac. (2d) 1194, cited by Petitioners:

Delaware County National Bank v. King (Sup. Ct., Appellate Division), 95 N. Y. S. 956.—The Southern Textile Company gave appellant bank its note for $28,000.00. At the same time, and in order to induce the bank to accept the same and part with value therefor, appellee King and three other individuals, for a valuable consideration, executed and delivered to the bank an agreement in writing, whereby they guaranteed to the bank, each to the amount of $5,000.00, the payment of said note, with interest at

maturity. After the payment of $10,400.00, the Textile Company defaulted, and the bank sued King alone for $5,000.00. King demurred to the complaint upon the ground of defects of parties defendant, in that the other three guarantors were not made parties defendant.

The Court said:

"It seems to me that the guarantors entered into a **joint** agreement with the plaintiff, whereby they **jointly** guaranteed the payment of the note at maturity; their obligation being that, if the note was not so paid, they would be liable therefor, each to the amount of $5,000.00. If the note had been paid, with the exception of one sum of $5,000.00, a right of action would not have existed to have compelled any one of the guarantors to have paid this amount. Each would have been liable only for his proportional share thereof. **The guaranty was joint, but the amount of liability was limited. Where several persons execute an instrument upon the same consideration, at the same time, and for the same purpose, and which takes effect from a single delivery, it is a joint promise.** Promises of several persons are presumed to be joint and not several, unless a contrary intention is shown in the instrument. **I am unable to spell out any such intention from the phrase, 'each to the amount of $5,000.'** There is no difficulty with the rule of law. Parties may make a joint obligation, or a several obligation, or a joint and several obligation, as they will. It is the construction to be placed upon the peculiar words of the instrument itself which causes the difficulty. In Muzzy v. Whitney, 10 Johns 226, it was held that an obligation was joint, although one half was to be taken from one obligor's share, and the other half from the share of two other obligors; the court saying: 'This latter part of the memorandum was only a designated mode of distribution of the debt as between the defendants.' In Alpaugh v. Wood, 53 N. J. Law 638, 23 Atl. 261, the Court of Error and Appeals of New Jersey said:

"'**The inference of a joint obligation is not defeated by the fact that it appears, either in the terms of the contract or from the circumstances of the transaction, that each promisor is to contribute separately to the entire result for which they bargain.**'"

Another and more recent New York case is that of **Marine Trust Co. of Buffalo v. Richardson,** 12 N. Y. Supp. (2d) 834 (decided June 13, 1939). The contention of the appellant Trust Company was that the Trial Court should have dismissed the complaint upon the ground that the following instrument upon which suit was brought against it alone as one of the numerous obligors, established a **joint** liability upon the part of all of the obligors and not a **several** liability. The instrument was as follows:

"To the Bank of East Aurora:

"We request that you loan from time to time to the Mead School * * * such sums as may be necessary for the erection of a school in the Village of East Aurora and for value received, we for ourselves and our heirs, executors and administrators, do hereby guarantee and become responsible for the payment of all such sums due on such paper, either to you or to your assigns.

"And we do for ourselves and for our heirs, executors and administrators, expressly promise and agree upon the default of the said Mead School, that we will pay all such sums provided that our total liability shall not at any time exceed the sum of four thousand ($4,000.00) dollars and **provided that our individual liability shall in no case exceed the sum of two hundred ($200.00) dollars.** * * *"

The Court said:

"How there are to be determined the questions as to whether there is a joint or a several obligation or a joint and several obligation is well stated in sec. 112 of the Restatement of the Law of Contracts, American

Law Institute, which section sets forth the rule as follows: 'Section 112. Except as qualified by sections 115, 116, where two or more parties to a contract promise the same performance to the same promisee they incur only a joint duty unless the contrary is stated, or unless the terms of the promise or the extrinsic circumstances indicate an intention on their part to be bound severally, or jointly and severally.'

"Sections 115 and 116 of such restatement as referred to in sec. 112 above quoted, have reference to expressions of intent in the use of the first person singular (sec. 115) and sec. 116 applies to negotiable instruments. This court has examined the instrument which is the subject of the suit with the above restatement of the law in mind. The plaintiff-respondent claims that the instrument itself shows that the defendant-appellant and his co-obligor indicated intention to be bound jointly and severally. Such contention of the plaintiff-respondent is based on the following stated quotations from the instrument: 'Our individual liability shall in no case exceed the sum of $200.00' and 'or in any manner affect the liability of us or either of us. * * *' With this contention this court cannot agree with the plaintiff-respondent because **the court is of the opinion that the object of such language was to limit the maximum amount of the share of the total obligation which each obligor was to bear, and the words were not indicative of an intention to sever the total obligation into definite amounts to be borne by each obligor.** Delaware County National Bank v. King, 109 App. Div. 553, 95 N. Y. S. 956; Sisto v. Bambara, 228 App. Div. 456, 240 N. Y. S. 121. See also section 112, Restatement of the Law of Contracts, American Law Institute. * * *

"The sole intention, in so far as the burden of the obligations was concerned in the making of the instrument above quoted, was that the obligation was to be joint on the obligors, and the limitation of $200.00 was simply the maximum to which an individ-

ual obligor would be liable on the enforcement of the joint obligation as against all liable thereon."

Other cases directly in point and containing similar holdings are **Byington v. Little Rock Chamber of Commerce** (Sup. Ct. of Arkansas), 201 S. W. 122; **Taylor v. Everett** (Sup. Ct. of N. C.), 124 S. E. 316; **Southern United Ice Co. v. Rapides Groc. Co.** (Ct. of App.-Louisiana), 187 S. 313.

On page 42 of his Petition for Writ of Certiorari counsel admits that Petitioner "**could be** held jointly and severally liable for $1,500.00 principal and $1,000.00 interest, but for no more," but says that this would not be sufficient to confer jurisdiction upon the Federal District Court. We submit that this contention is completely answered by the Texas Commission of Appeals in the case of **Miller v. Bush**, supra, by the New York Supreme Court, Appellate Division, in the case of **Delaware County National Bank v. King**, supra, and by the New York Supreme Court in the case of **Marine Trust Company of Buffalo v. Richardson**, supra, where they said:

"The contract under consideration creates a joint and several obligation. The clause next succeeding the one we have quoted (i. e., the clause limiting the liability of each guarantor) does not affect the nature of this obligation. This clause has effect simply to restrict, as to amount, the liability of the several parties." **Miller v. Bush**, supra.

"The guaranty was joint, but the amount of liability was limited." **Delaware County National Bank v. King**, supra.

"The court is of the opinion that the object of such language was to limit the maximum amount of the share of the total obligation which each obligor was to bear, and the words were not indicative of an intention to sever the total obligation into definite amounts to be borne by each obligor." **Marine Trust Company of Buffalo v. Richardson**, supra.

Mr. Justice Day, speaking for the Court in the case of **Alabama G. S. R. Co. v. Thompson,** 200 U. S. 206, 50 L. Ed. 441, said:

"In the case of Powers v. Chesapeake & O. R. Co., 169 U. S. 92, 42 L. Ed. 673, 18 Sup. Ct. Rep. 264, 265, suit was brought against a railroad company and several of its servants for an injury alleged to have been caused by the joint negligence of all. Mr. Justice Gray, delivering the opinion of the court, said:

" 'It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, **"a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."** ' (Citing many authorities.) • • •

"As shown in the opinion of the Chief Justice in the Dixon case (179 U. S. 131, 45 L. Ed. 121, 21 Sup. Ct. Rep. 67), the cases are in difference as to whether a common-law action can be sustained against master and servant jointly because of the responsibility of the master for the acts of the servant in prosecuting the master's business. In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the state court by the filing of a declaration in which he alleged a joint cause of action.

"Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action, and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this court, it does not."

Mr. Justice Hodges, speaking for a Texas Court of Civil Appeals in the case of **Parlin & Orendorff Imp. Co. v. Frey**, 200 S. W. 1143, in which writ of error was refused, referring to the Alabama G. S. R. Co. v. Thompson case, supra, said:

"It is true that in both of the above cases the suits were founded upon torts; but the ruling principle governing the right of removal is not different from that which should be applied in suits founded upon contract."

If there be any doubt as to whether the liability under the contract of guaranty in question is joint and several, or several only, which doubt Respondent denies, then such doubt should be resolved in favor of the joint and several liability. The Circuit Court of Appeals for the Fifth Circuit in the case of **Brill v. Jewett**, 262 F. 935, said:

"The presumption of law is that when two or more in writing incur an obligation the undertaking is joint, and not several, unless the language used discloses a different intention."

To the same effect is **In Re: John B. Rose Co.**, 275 F. 409, by the Second Circuit Court of Appeals. Citing numerous authorities.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER THIRD REASON (b) AND (c)

Inasmuch as the reasons and authorities under Paragraphs (b) and (c) hereunder are so closely associated, we will discuss them together.

It has long been the well-established rule in the Federal Courts that where the defendants have so tied themselves and their respective claims together as to make them in reality one claim, a plaintiff may join such claims in a single suit and the aggregate amount thereof will determine the value of the matter in controversy for jurisdictional purposes. In the instant case Petitioners have clearly so tied themselves together in the execution of the aforesaid contract of guaranty as to bring themselves within the above rule.

As above stated, the reason advanced in Paragraph (b) for the refusal of a Writ of Certiorari is predicated upon the assumption, for the sake of argument alone, that the liability of Petitioners under the foregoing contract of guaranty is several and not joint. Petitioners in their brief state that there are only three exceptions to the general rule against the joinder in a single suit of causes of action against several defendants not jointly liable, and those exceptions are (1) cases where the causes of action are tied together by a fraudulent conspiracy; (2) suits in equity to avoid a multiplicity of suits; and (3) creditors' bills. We submit that the true test of the exception to the general rule is whether or not the various claims have been so **tied together as to amount in reality to a single claim,** rather than the nature of the cause of action alleged. If Petitioners' contention were correct, the rule would put a premium upon, and give a peculiar advantage to cases of, fraud. The following cases, we submit, show that the rule is not limited to cases of fraud, but covers any kind of case where the transaction and the various claims are so closely tied together as to make them in reality one:

1 Cyc. Fed. Proc. 330 states the rule as follows:

> "There are some controversies which are single in nature though involving a diversity of claims and

claimants, such, for example, as Mechanics' lien suits, the aggregate of which brought into one suit make one controversial amount. On the other hand **one contract** or **transaction** or **right** may generate diverse and independent claims **capable of being united into one controversy in a single suit.**"

Sovereign Camp, Woodmen of the World v. O'Neill et al., 266 U. S. 292, 69 L. Ed. 293, although involving a case of conspiracy, states the rule very clearly, and from the reasoning therein contained it can be seen that said rule is not limited in its application to cases of conspiracy or fraud. The facts in that case were these: 25 members of the Sovereign Camp filed 25 separate suits against said Camp in the State Courts to recover sums ranging from $987.00 to $1,170.00, which they **severally** claimed as per diem and mileage allowances and traveling expenses. The Camp went into the Federal District Court at Dallas with a suit against all 25 of said members, alleging that the latter had entered into an agreement and conspiracy to embarrass and attempt to ruin the Camp, and in pursuance thereof, had brought the said 25 separate suits. The Camp asked that the defendants be enjoined from prosecuting their separate suits in the State Courts. Justice Sanford, speaking for the United States Supreme Court, and in reviewing the case of **McDaniel v. Traylor**, 196 U. S. 415, 49 L. Ed. 533, wherein the heirs of one Evans brought suit to enjoin the several defendants from enforcing their claims against the estate where each claim was less than the requisite jurisdictional amount, but their aggregate exceeded that sum, based upon the allegation that the claims were not real debts but the result of a conspiracy to defraud the heirs, said:

> "**By reason of that combination,** resulting in the allowance of all those claims in the probate court, as expenses of administering the estate of Hiram Evans, **the defendants have so tied their respective claims to-**

gether as to make them, so far as the plaintiffs and the relief sought by them are concerned, one claim. The validity of all the claims depends upon the same facts. The lien on the lands which is asserted by each defendant has its origin as well in the combination to which all were parties as in the orders of the probate court, which, in furtherance of that combination, were procured by their joint action";

and quoting from the opinion in the same case (**McDaniel v. Traylor**) on a second appeal, 212 U. S. 428, 53 L. Ed. 584, said:

> "By reason of that combination we decided the claims were **'so tied' together** as to make them, 'so far as the plaintiffs and the relief sought by them are concerned, one claim.' "

Justice Sanford then concluded:

> "We find that, under the allegations of the present bill, the case comes fairly within the reason of the exception recognized in the McDaniel Cases. It is not only alleged that the defendants' claims are without foundation, but that they originated and are being prosecuted in the state court in pursuance of an agreement and conspiracy to embarrass and attempt to ruin the society. There is no dispute as to the amount of any particular claim; and the validity of **all** of them depends upon the **same issue.** A conspiracy to prosecute, by concert of action, numerous baseless claims against the same person for the wrongful purpose of harassing and ruining him, partakes of the nature of a fraudulent conspiracy; and in a suit to enjoin them from being separately prosecuted, it must likewise be deemed **to tie together such several claims as one claim for jurisdictional purposes, making their aggregate amount the value of the matter in controversy.** We conclude, therefore, that, on the face of the bill, the district court had jurisdiction of the suit by reason of the diversity of citizenship and the amount in controversy." (Emphasis our own.)

While the O'Neill case, supra, involved a case of conspiracy, it will be noted that the reasoning on which the decision of the Court was based is in no wise limited to such cases.

In **American Central Ins. Co. v. Harmon Knitting Mills,** 39 Fed. (2d) 21, the United States Circuit Court of Appeals for the 7th Circuit, had before it a bill in equity brought by the insured against seven companies upon seven different policies of insurance, each of which policies provided that there should be no liability for any greater proportion of the loss than the amount the policy bore to the entire insurance. (This is identical with our case for, under the Delaware County National Bank v. King case, reported on page 16, supra, the effect of the contract of guaranty in our case was that each guarantor became liable for his proportionate part of the total loss, provided said proportionate part did not exceed the sum of $2,500.00.) The Court approved the jurisdiction, saying:

> "If equity has jurisdiction of this cause, it is because it will avoid numerous actions at law. But something more is required than the avoidance of a multiplicity of suits. There must be a common interest existing among the individual defendants and between them and the plaintiff in order that a court of equity may interfere. * * * This common interest exists in the present suit, if at all, because of the similar provisions in all of the insurance policies and particularly because of that provision heretofore quoted which makes each appellant liable for only its proportion of the total loss. Is this common interest of such a nature, extent, and object, as to justify the assumption of jurisdiction by a court of equity? We think it is. Milwaukee Mechanics' Ins. Co. v. Ciaccio (C. C. A.), 38 Fed. (2d) 153. **All the defendants were interested in the loss, the determination of which constituted what might be called the gist of this suit.** It is true, each cause of action is based upon a con-

> tract, but liability is measured by the **insured's loss** rather than by the amount of the policy. In fact, liability under the contract is dependent upon the amount of **all the outstanding insurance** as well as the amount of the loss. How is the amount of outstanding insurance to be determined? And how can one company's proportion be ascertained without first ascertaining the total amount of insurance." (Emphasis our own.)

This case is even stronger than our own. In it each of the defendants had a separate contract of insurance, while in ours all of the defendants joined in a single contract. In our case, just as in the American Central Insurance Co. case, supra, all of the defendants had a common interest, first in obtaining the loan for the Y. M. C. A., and, second, the amount of the loss to the bank, if any. As said in the American Central Insurance Co. case "How can one company's proportion be ascertained without first ascertaining the total amount of insurance?"

A similar case is that of **Jamerson v. Alliance Ins. Co. et al.**, 87 Fed. (2d) 253, cert. denied 300 U. S. 683, 81 L. Ed. 886. This was a suit brought in the Federal Court by ten different insurance companies to enjoin Jamerson from prosecuting as many separate suits against them in the State Courts upon ten different policies of insurance upon the same stock of merchandise. The Companies alleged that each policy contained a provision that the insurer was not liable for more than its pro rata share of the total loss, and that none of the companies was liable on any of the policies because the defendant had fraudulently conspired with others to procure said policies, and had conspired to bring about the fire which destroyed the insured property. Jamerson pleaded want of jurisdiction, and the Court said:

> "The bill alleged equity jurisdiction first, because of the language of the policies which required an ac-

> counting with respect to the total liability and the prorated liability, and second, because the equity proceeding would avoid a multiplicity of suits. * * * We conceive of no reason why separate defendants in separate actions at law may not join their several claims for jurisdictional purposes, when, as here, their claims are identical and are the result of an unlawful and fraudulent conspiracy entered into by appellant and his co-conspirator against all of appellees."

It will be noted that we have present in our case both of the equitable grounds upon which jurisdiction was rested in the above case, namely, the proration of the liability of the Guarantors and second, the avoidance of a multiplicity of suits. In deciding the Jamerson case, supra, the Circuit Court of Appeals spoke of the fact that the opinion by the Trial Court was very well considered and adopted his reasoning. The Trial Court in his opinion quoted as follows from **Weininger v. Metropolitan Fire Ins. Co.**, 359 Ill. 584, 195 N. E. 420, 98 A. L. R. 169:

> "In the case at bar we have the **common right** in the complainants against the defendants, the establishment of which would regularly require the bringing of at least sixteen separate law actions. No defendant here has a defense which is personal to it, alone, but the defenses are common to all the defendants. If liable, each is liable for the payment of loss under the same conditions as the others. The record contains over 5,200 pages. While the cost of litigation is not the only criterion, yet in determining whether the defendants are subjected to any hardship by having the issues here tried in equity, the question of expense to the litigants and the time of the court in settling the issues are factors that may properly be considered by the court."

A leading authority and a case often cited is that of **Troy Bank v. G. A. Whitehead & Co.**, 222 U. S. 39, 32 S. Ct. 9, 56 L. Ed. 81. Upon a sale of land situated in Kentucky,

the Vendor reserved a Vendor's lien for the unpaid portion of the purchase price, for which he took two promissory notes of $1,200.00 each, payable in one and two years. Thereafter, he assigned the notes to two different people. By the law of Kentucky, the Vendor's lien passed to the assignees as a common security for the payment of both notes, without any priority of right in either assignee. The assignees jointly brought this suit in the Federal Court upon said notes and to enforce their Vendor's lien. The sole question for determination was whether the sum in dispute met the jurisdictional requirements of the Federal Court. Mr. Justice Van Devanter, speaking for the Court, said:

> "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; **but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.** (Citing numerous authorities.)
>
> "The present suit is of the latter class. Its controlling object—that which makes it cognizable in equity—is the enforcement of the vendor's lien, which is a single thing or entity in which the plaintiffs have a common and undivided interest, and which neither can enforce in the absence of the other. **Thus, while their claims under the notes were separate and distinct, their claim under the Vendor's lien was single and undivided, and the lien was sought to be enforced as a common security for the payment of both notes.**"

Here the tying link between the two defendants was the Vendor's lien, just as in our case the contract of guaranty was as between the 26 defendants.

Brusselback v. Arnovitz et al., 87 Fed. (2d) 761, is a

case against certain stockholders of a bank to enforce their individual liability thereon under the Statute, to wit, 12 U. S. C. A., par. 812, which reads as follows:

> "Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares"; (This Statute it will be noted imposes the same liability upon the stockholders as the contract of guaranty does upon the Guarantors in our case.)

The various defendants moved to dismiss the Bill, and the Court sustained their Motions. The gravamen of the court's action was that the bill was not sustainable for lack (1) of jurisdiction in equity and (2) of the requisite statutory amount involved. The Circuit Court of Appeals said:

> "We think otherwise * * *. The alleged liability of defendants arose out of title 12, U. S. C. A., par. 812. It is an obligation to be borne equally and ratably by all defendants. When enforced, its proceeds go into a common fund which when made ready for distribution should be shared equally and ratably by all creditors. * * *
>
> "Appellees contend that the jurisdictional amount is fixed by the separate liability of each defendant which they construe to be less than $3,000, but such is not the test by which jurisdiction is determined. The amount in controversy is the **value of the fund to be collected** and distributed. See Brusselback v. Cago Corporation, supra, 85 F. (2d) 20, at page 23; Brusselback v. Chicago Joint Land Bank, 85 F. (2d) 617, 619 (C. C. A. 7)."

On a former appeal of the same case, 85 Fed. (2d) 20,

in which the Supreme Court denied a writ of error, 299 U. S. 586, 81 L. Ed. 432, the Circuit Court of Appeals said:

> "The contention of some of the appellees that since the amount claimed against them is less than $3,000, the court is without jurisdiction, is erroneous. The court has jurisdiction over the fund sought to be collected here and such jurisdiction necessarily carried with it jurisdiction over all component parts of the fund. Hence the fact that liability of certain stockholders may be less than $3,000 does not deprive the court of jurisdiction as to them. Robertson v. Conway, 188 F. 579 (C. C. A. 6); Conway v. Owensboro Savings Bank & Trust Co., 185 F. 950 (C. C. W. D. Ky.); Reconstruction Finance Corporation v. Central Republic Trust Co., 11 F. Supp. 976 (D. C. N. D. Ill. E. D.)."

Equitable Life Assur. Soc. of the U. S. v. Templeton, 19 Fed. Supp. 485, is another case very similar to our own. Appellant issued to the Southern Railway a master group policy of insurance. Numerous certificates were issued pursuant to the terms of said group policy to a large number of employees of the Railroad. Five employees filed their separate suits in the State Court of South Carolina against appellant, each claiming the amount of his certificate as damages for alleged breach of contract. Three of the certificates were for $3,000.00 each and two for $2,000.00 each. Appellant brought this suit in the Federal Court against all five employees individually and as a class representing any and all persons having or claiming any rights under said group policy, asking that said group policy and all certificates thereunder be canceled and that the defendants be enjoined from prosecuting their said separate suits. The Court said:

> "The Court unhesitatingly holds that this case concerns the group policy in question and admittedly the amount of coverage in this group policy is far in ex-

cess of that required by the statutes of the United States for the jurisdiction of this court in a case of this character."

Here the various separate certificates of the defendants all grew out of the same transaction and were tied together by the group policy issued to the Railroad. In our case the liability of each of the defendants grew out of the same transaction, was not evidenced by separate certificates but by a single instrument, to wit, the contract of guaranty, and were tied together not by a separate instrument given to some third party as was the group policy to the Railroad, but by the same identical instrument. Another point of similarity between the two cases is that the separate certificates issued to each employee in the Templeton case limited the amount of the Company's liability to that particular employee, which amount was under the jurisdictional amount of the Federal Court, just as the provision in the contract of guaranty in our case limited the liability of each of the defendants to $2,500.00. We submit that this case is strikingly similar to our own.

Overby v. Gordon, 177 U. S. 214, 44 L. Ed. 741:

"The amount of the estate which passes by a will, if that is held valid, constitutes the matter in dispute on a contest of the will, without regard to the amount of the interest of any one of the contestants, within the meaning of the act of Congress of February 9, 1893 (27 Stat. at L. 426), requiring the matter in dispute on appeal from a judgment of the court of appeals of the District of Columbia to exceed the sum of $5,000."

Weaver v. Norway Tack Co., 80 F. 700, held that where an action is brought upon a single agreement based upon the use of three distinct patents, it is unimportant for the purpose of giving jurisdiction of the suit that the sum

claimed to be due on any one of the patents does not exceed $2,000, provided that the total sum claimed upon all three patents does. The Court said:

> "The claim is not upon several contracts but a single one based upon the circumstances attending the use of the several machines."

Lake Charles Rice Milling Co. v. Pacific Rice Growers Association et al. (C. C. A. 9th), 295 Fed. 246, cert. denied 266 U. S. 602, 69 L. Ed. 462. The milling company brought this suit in equity against the Association, a corporation, and forty-nine individual growers and owners of rice for an accounting and recovery of a judgment against each of them. Its bill alleged that the Association entered into contracts with the individual rice growers, whereby the latter authorized the Association to enter into contracts with the milling company whereby the growers agreed to ship rough or paddy rice to appellant at its mill in Louisiana, which was to mill and sell the same at specified charges for appellant's services; that appellant was to advance the freight and to advance to the Association for account of the owners $5.00 per bag of paddy rice when received, and the Association was to deduct the sum of 5 cents per hundredweight to cover its own regular commission charges out of the final returns made by appellant. The bill further alleged that the appellant advanced to the Association pursuant to said agreements $5.00 per sack, amounting to $374,310.00, and paid freight charges in the sum of $52,368.02. The milling charges due appellant thereon were $44,064.45; that appellant had remitted to the Association sums aggregating $30,363.57, and still had the further sum of $7,272.26 derived from sales which it was ready to pay to those entitled thereto. The bill further alleged that there was then due and owing to appellant from the appellees the sum of $72,572.81; that appellant had been informed and be-

lieved that by reason of its aforesaid payments to the Association, some of the defendants had received a larger portion of the proceeds of sale than they were entitled to receive, and that others had received less than they were entitled to receive.

The Court said:

> "**The court below held that the rights of the appellant as against each of the appellees were wholly separate and distinct as arising under independent contracts with each, and that there was no community of interest between them.** It may be conceded that under the provisions of section 267 of the Judicial Code, enacted for the purpose of emphasizing the protection of a trial by jury guaranteed by the Seventh Amendment, and providing that no suit in equity may be maintained in any case where a plain, adequate, and complete remedy may be had at law, if the case here is one in which no equitable rights are involved and the actions against the 49 individual defendants are all distinct and involve different issues and different proofs, the ruling of the trial court was correct and the cause was properly dismissed. But we do not so regard the case. * * * Taking the averments of the bill to be true, it appears therefrom that the appellant cannot without an accounting ascertain the amount of each rice owner's share of liability for the unpaid balance which it claims. We cannot agree with the appellees' contention that whether or not the association properly accounted to its principals is a matter with which the appellant has no concern. The amount which the appellant is entitled to recover against the appellees, if any amount is still due and owing to it, depends upon the amount which each appellee has received at the hands of the association.
>
> "But even if there were no necessity for an accounting in equity, other grounds for the interposition of a court in equity sufficiently appear in the allegations

of the bill. **From the facts alleged it seems obvious that if there is a defense to the appellant's demand it must be a defense which is common to all the appellees. This is not a mere conglomeration of actions at law for the recovery of money involving different issues and different proofs.** The appellees here are not idle spectators as to every cause of action except their own. On the contrary, each of them has an immediate interest in the causes of action against his co-defendants and in the question of law and fact involved. The appellees are all residents of the rice growing area in the Northern district of California. **By joining them in a single action the interests of all parties and of the court will be subserved and multiplicity of suits will be avoided."** (Citing authorities.)

In **Wyman v. Bowman** (C. C. A.), 127 Fed. 257, a suit by the Receiver for a corporation against individual defendants to enforce their liability upon their stock subscriptions, the court said:

"This court has repeatedly held—and that holding is sustained by the great weight of authority—that a bill in equity against several defendants separately liable either at law or in equity may be maintained, in order to avoid a multiplicity of actions at law or of suits in equity, **whenever there is a common and decisive point of litigation between the complainant and the defendants,** the complainant has no remedy at law as prompt, practical, and efficient to attain the ends of justice as the suit in equity, and the convenience of the complainant in pursuing the single suit in equity is not overcome by the deeper inconvenience of such a course to the defendants. (Citing cases.) **In the suit under consideration, every point of litigation between complainant and the defendants is common to all the latter.** * * * Why does not this suit prevent a multiplicity of actions at law, and give to the complainant a more efficient and practical remedy,

without inconvenience to the defendants, than nine separate actions at law could give? The remedy at law which will preclude the maintenance of a suit in equity must be 'plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' (Citing cases.)

"**Would nine actions at law, in which the same questions of law and fact would be tried nine times upon the production and reproduction of the same evidence before nine different juries, be as efficient and prompt or as practical a means to determine the questions here at issue, and to attain the ends of justice, as this single suit in equity?** The question is its own answer. Is there any deeper inconvenience to the defendants than would be compensated for by the convenience of the plaintiff in pursuing this remedy? None is proved; none can be conceived. **Indeed, the single suit in equity entails less expense, less labor, and less trouble upon the defendants by as much as it is less expensive and troublesome to try a single suit in equity than it is to try nine actions at law, involving the same controversies, conditioned by the same evidence. The defendants have a common interest in every material question of law or of fact involved in the controversy in this suit.** The remedy of the complainant by this proceeding in equity is far more efficient, prompt, and practical to attain the ends of justice, and much less expensive and inconvenient to all the parties to the controversies, than nine actions at law would be."

Judge Atwell in his opinion in this case in the Trial Court said:

> "The obligation, the responsibility, and the defenses are identical as to each defendant" (R. 17).

The Trial Court also said in his opinion, and Petitioners have urged the point in many places in their Petition for

Certiorari, that equity will not take cognizance of this suit because Respondent has an adequate remedy at law in that it can go into the State Courts and join all of the Petitioners in a single suit. **3 Cyc. Fed. Proc. 112** answers that proposition as follows:

> "And it has been the uniform rule from the beginning that the adequate remedy at law which will prevent a Federal Court of equity from taking jurisdiction must be such remedy in the Federal Courts, not those of the States." Citing Risty v. Chicago, R. I. & P. R. Co., 270 U. S. 378, 70 L. Ed. 641, and a full half page of other authorities.

In **Osborne et al. v. Wisconsin Cent. R. Co.** (C. C.), 43 Fed. 824, 826, Justice Harlan, sitting in circuit, held that the court had jurisdiction in equity of a suit in behalf of various claimants of land. The several tracts had been entered at different dates by different persons, but the titles depended upon the **same questions in law and fact.** Plaintiffs sought to restrain a railroad company from prosecuting suits against the plaintiffs. Justice Harlan said:

> "The Company's claim is good or bad against all the plaintiffs, as it may be good or bad against any one of them; and yet a judgment in favor of one, in an action of ejectment brought by the company, would not avail the others in separate actions of ejectment against them. The cause is peculiarly one in which the jurisdiction of a court of equity may be invoked in order to avoid a multiplicity of suits. **It belongs to the class 'where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone.'** 1 Pom. Eq. Jur., sections 245, 255, 257, 268, 269, 273, and au-

thorities cited in notes to these sections. Crews v. Burcham, 1 Black 352, 357 (17 L. Ed. 91). In such cases the plaintiffs are **united** by a **common tie**, created by identity of interest in the decision of the same questions of law and of fact, and have a **common** adversary. The fact that the several tracts of land here in dispute were entered at different dates, and by different persons, is of no consequence, as the validity of each entry, as against the railroad company, depends upon precisely the same questions of law and fact."

The same rule of permitting the joinder in a single suit of causes **"tied together," or growing out of the same transaction** prevails in Texas. In **Gregg v. Texas Bank & Tr. Co.** (Civ. A.), 235 S. W. 689, error refused, the plaintiff bank sued D. A. and J. M. Gregg upon 6 notes executed by D. A. Gregg. J. M. was on one note only, as an endorser. Upon a plea of misjoinder of parties, the defendants raised the proposition that different causes of action against different defendants cannot be maintained in the same suit. The Court said:

"As an abstract proposition, that would be true, but under the facts of this case we do not believe the contention is sound. The record discloses that the notes in toto in question **grew out of** and were executed in pursuance of an agreed settlement of a land suit involving the title to a tract of land in which judgment embodying the agreement of the parties was entered, said agreement providing for the execution of all the notes, liens, deed, and deed of trust as alleged by plaintiff, and this suit is but the enforcement of the remedies there given."

Chief Justice Taney, speaking for the Court in **Shields v. Thomas**, 58 U. S. (17 How.) 3, 6, 15 L. Ed. 94, said:

"It is like a contract with several to pay a sum of money. It may be that the money when recovered is to be divided between them in equal or unequal proportions. Yet if a controversy arises on the contract,

and the sum in dispute upon it exceeds $2,000, an appeal would clearly lie to this court, although the interest of each individual was less than that sum."

Furthermore, we think that Rule 20 under the New Rules of Federal Procedure gave Respondent the right to join all of the Petitioners herein in a single suit. Said Rule, we submit, is the same as the rule of decision embodied in the foregoing cases. Rule 20 reads as follows:

"(a) **Permissive Joinder.** All persons **may** join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. **All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or, in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.** A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

STATEMENT, ARGUMENT AND AUTHORITIES UNDER THIRD REASON (d).

Petitioners state that the decision in the instant case by the Circuit Court of Appeals is contrary to the decisions of the Supreme Court in the cases of:

Ex Parte Phoenix Insurance Company, 117 U. S. 367;
Wheeler v. Cloyd, 134 U. S. 537;
Wheless v. St. Louis, 180 U. S. 379, 382.

That such is not the case is clearly shown in the following quotations from said cases:

Ex Parte Phoenix Insurance Co., supra:

> "The suit was brought on a single instrument, by which, as it was adjudged, an agent of the several insurance companies named bound them **severally**, each for its proportionate share of one-fourth, to insure the property of Mrs. Helen M. Fitton for $12,000; and the decree is against each company **separately** for its separate obligation under this instrument, to wit, $3433.50 and no more. The bill alleged the **separate** liability of each company, and prayed, in substance, for decrees against them **severally** for the proportion assumed by each in the contract."

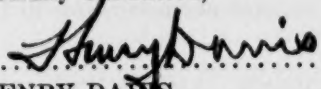
Wheeler v. Cloyd, supra:

> "It is clear that the appeal must be dismissed. The decree from which it was taken was not a **joint** decree, as is readily observed by a mere inspection of it."

The **Wheless v. St. Louis** case, supra, involved a tax assessment against various individual defendants and no claim of joint liability whatsoever is made therein.

Wherefore, premises considered, Respondent respectfully prays that the Court refuse to grant a Writ of Certiorari herein and for such orders as may be appropriate.

Respectfully submitted,



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